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SYMPOSIUM
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INTRODUCTION

On March 11 and 12, 1977, the Indiana Continuing Legal Education Forum, in cooperation with the Indiana State Bar Association and the Indiana University School of Law—Indianapolis, presented a Products Liability Institute in Indianapolis. The speakers at the Institute were nationally-known practitioners and academicians, and the topics discussed were areas of products liability law which are of interest to scholars and practitioners alike because of their timeliness and controversial nature. The Staff of the *Indiana Law Review* is pleased to present this Symposium, comprised of articles by participants at that Institute.

John F. Vargo, an attorney from Indianapolis, was the chairman of the Institute and has contributed an article to this Symposium on the subject of the standard for strict tort liability in Indiana. Professor Thomas F. Lambert, Jr., who is the Editor-in-Chief of the American Trial Lawyers Association *Newsletter* and teaches at Suffolk University Law School, gave an insightful overview of the subject for the participants. The next speaker, Dean Aaron Twerski, has contributed an article to this Symposium on the same subject as his presentation at the Institute: comparative negligence. Professor David Owen discussed the implications to products liability actions of a highly blameworthy manufacturer, and his article on the same subject appears in this Symposium.

Professor Clifford Davis' topic was settlements in multiple-defendant situations. His Symposium article expands on that topic and discusses contribution and indemnity along with the settlement issues. Professor Victor E. Schwartz, who teaches at the University of Cincinnati College of Law, gave a briefing report of the Interagency Task Force on Product Liability, of which he is a member. Professor Jerry J. Phillips, who teaches at the University of Tennessee College of Law and is the Dean Emeritus at that shcool, compared negligence and strict tort liability. He was unable to contribute an article to this Symposium but has recently published an article in

another law reivew, *The Standard for Determining Defectiveness in Product Liability.*[1] Professor Laurence H. Eldredge of the University of California, Hastings College of Law, contributed an enlightening review of the history of the *Restatement of Torts* in his presentation at the Institute. The final speaker at the Institute was Dean John W. Wade. His wrap-up has been adapted as the introductory article in this Symposium.

The *Review* is grateful to the sponsors of the Institute for the opportunity to publish the articles in this Symposium, and to the authors for their time and cooperation.

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[1]46 U. CIN. L. REV. 101 (1977).

A Conspectus of Manufacturers' Liability for Products

JOHN W. WADE*

To organize the matters covered in this symposium and put them into perspective, a conspectus, or brief overview of the general subject with a modicum of explanation, may prove useful.[1]

I. THEORIES OF RECOVERY

A. Genesis of Strict Liability

Let's start at the beginning, with the three theories of recovery: (1) negligence, (2) breach of warranty, and (3) strict tort liability. The traditional negligence theory has existed for some time and is well understood; and there is no need for me to trace its historical development. Breach of warranty includes both breach of implied warranty and breach of express warranty. In both, the major problem, at least in the beginning, was the requirement of privity. In the development of the strict liability theory, cases based on breach of warranty were the starting point. As a matter of fact, the cases upon which Dean Prosser relied in preparing section 402A and adding it to the *Restatement (Second) of Torts* were primarily breach of warranty cases involving food products. These cases were an appropriate basis for development of the strict liability theory because they were the cases in which the courts were doing away with the requirement of privity. If there is privity of contract there is no need to worry about strict liability in tort, because a breach of warranty theory would apply and provide relief for physical injury as well as for loss of bargain. As the privity requirement disappeared, the theory of strict liability in tort became dominant. The question of which came first, the *Restatement* or *Greenman v. Yuba Power Products, Inc.*,[2] is inconsequential; together they produced strict liability in tort.

B. Relation to UCC

There has been a question about whether strict liability in tort or the tort action for breach of warranty is constitutional. A number of writers have argued that the courts have trespassed on the

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[1]This treatment is based upon a talk given at the Products Liability Institute. Although it has been slightly revised, it has not been rewritten and therefore retains the somewhat looser organization and more informal style of an oral presentation.

[2]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

authority of the legislatures in indirectly changing the Uniform Commercial Code.[3] Although there have been a number of articles, the question is now academic, because strict liability in tort has been widely adopted. My own analysis is that strict liability is accurately based on a form of negligence per se, much as actions based on the pure food statutes. Under these statutes it is held that if one sells unwholesome food he is negligent, without regard to whether he is negligent in letting the food get in that condition; and that is essentially the rationale of strict liability in tort. If the defendant sells a product that is defective or unreasonably dangerous, he is by that act at fault. It is not necessary for the plaintiff to prove in any respect how the product happened to get in that dangerous condition; putting the product on the market in that condition is the equivalent of negligence.[4] That theory has been adopted by a number of courts, and has proved effective even in states that have comparative negligence statutes. They apply their comparative negligence statutes to the strict liability theory. In a number of states, including Indiana, it is possible to have counts in a complaint based upon each of these theories, and it often happens that a plaintiff will attempt to include each of them in order to gain any advantage that may flow from one as distinguished from another. We are discussing three or four different theories—contract warranty, tort warranty, strict liability, and negligence. There are advantages and disadvantages to each as a basis for an action, but in any case, whatever theory is used, the product itself must be actionable. In other words, the concern at this point is not with the conduct of the defendant; it is necessary to find that the product itself was actionable.

II. When Is A Product Actionable?

There are three ways in which the product may turn out to be actionable. One is that something went wrong in the manufacturing process, and the product is not in the condition in which the manufacturer intended it to be. The product could be called "mismanufactured," or "mal-made," or, simply, wrongly made. The second way in which a product may turn out to be actionable occurs when there is something wrong with the design, the way in which it was intended to be made. This could be called "mal-design." The third way in which to find a product actionable is to find that there is an absence of necessary warnings or instructions or that the war-

[3]*E.g.*, Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 Tenn. L. Rev. 439 (1969); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. Res. L. Rev. 5 (1965).

[4]Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 Tenn. L. Rev. 123 (1974).

nings or instructions are inadequate. That may be termed "non-warning," or "mal-warning." Indeed, this warning aspect could be treated as a form of mal-design, since the inclusion of the warning is a part of the design of the product itself.

Having examined the three ways in which a product may turn out to be actionable, it is necessary to formulate a test of some sort to determine when the product is actionable under one of these ways. It is important to remember that this requirement—that the product be actionable—is present no matter what theory the plaintiff sues on. I suppose the first theory an attorney thinks about is one based on warranty. There are, of course, two implied warranties—that the product is of merchantable quality, and that it is suitable for the purpose for which it was sold.[5] If it fails on either of those counts, it is actionable. The prime purpose of these warranties as originally developed was not to allow a cause of action for injury incurred from the product, but to allow a cause of action when the buyer did not get what he expected in his bargain. It was carried beyond this, however, to the area we are discussing. Consider the warranty of merchantability in relation to unwholesome food. If food sold is unwholesome, then it is actionable, whether because the food had to be thrown away or because it was eaten and caused illness.

One term used in the *Restatement* is "defective." The word "defective" can be very helpful if what is being discussed is a manufacturing error. The product then is not in the condition the manufacturer intended it to be in, and it just trips off one's tongue to say that it is defective. But the use of that language can cause trouble when what is wrong with the product is an improper design. There are cases in which the courts have said that the product was made exactly in the way the manufacturer intended to make it and there was thus no liability. One of the most famous cases of this type involved a vaporizer.[6] A child was lying near a steaming vaporizer when, for an unkown reason, it fell over. The top, which could not be screwed on, came off, and the child was badly burned. The court held in that case that the product was made as it was intended to be made; it was not defective. The decision may be correct, but it certainly was decided on the wrong basis. The court correctly pointed out that the way in which the manufacturer designed the product was safer than other methods might have been. If it had been designed so that the top was screwed on, the potential existed for a steam outlet to get stopped up and the whole thing might explode. Such a design would be more dangerous than the one marketed. The court's statement terming the product "not defective," however, is confusing.

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[5]U.C.C. § § 2-314, 2-315.

[6]Blissenbach v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951).

A clearer and more meaningful term is "unreasonably dangerous," a phrase that can be applied to products that are mal-made, mal-designed, or lacking in instructions or warnings. My personal preference is to say that a product is not duly safe. Two tests are set out to determine whether a product is unreasonably dangerous. A test was initially set forth in connection with breach of warranty cases for loss of bargain. In that case, the courts said, what you look to is what the buyer expected to get. This test will work in many cases, but sometimes the buyer does not know exactly what he should have received; he is thinking only of what the product will do for him. In addition, it seems to me that in a tort action it makes more sense to put the complaint in terms of what the seller did rather than what the buyer expected. For these reasons the test is better expressed in this way: Would the seller be negligent if he put the product on the market knowing its dangerous condition? In other words, strict liability eliminates the need to prove negligence on the part of the seller or the manufacturer in letting the product get in a dangerous condition, in failing to discover that dangerous condition, or in failing to do something about it.[7] There are some other important questions involved in determining whether a product is unreasonably dangerous, but I am leaving them for discussion under Special Problems, at the end.

III. CAUSATION

The emergence of theories of strict liability did not materially change the issue of causation.

A. Cause in Fact

It is necessary from the standpoint of cause in fact to prove that the product was defective or unreasonably dangerous, and that is sometimes a very difficult thing to prove. The plaintiff has to prove also that the defendant was responsible for that condition. The question here is not one of fault. The issue is whether the product was in that condition when it left the defendant, or was so potentially in that condition that he is responsible for it. And the plaintiff must also prove that the dangerous condition is what caused his injury.

The unreasonably dangerous condition of the product, defendant's responsibility for that condition, and the causal relation between the condition and the injury can often be proved by cir-

[7] I have discussed this general topic at more length and in more detail in *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973), *reprinted in* 1974 INS. L.J. 141 *and* 1974 PERS. INJ. ANN. 534. *See also* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967); Fischer, *Product Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974).

cumstantial evidence. It is not necessary to have direct evidence, although direct evidence is fine. Proving these things by circumstantial evidence is like using circumstantial evidence in other situations, but the form of circumstantial evidence called res ipsa loquitur is not germane. Res ipsa loquitur is relied upon in a negligence action as the circumstantial evidence that the defendant was negligent. It is important to distinguish proof of negligence from proof that defendant's negligence was the cause in fact of the injury to the plaintiff. These are two separate proof problems. There is no occasion to invoke res ipsa loquitur in connection with strict liability in tort, because there is no need to prove negligence on the part of the defendant. The plaintiff must, however, prove cause in fact and proximate cause.

B. Proximate Cause

One way to talk about proximate cause is to talk about the risk created by the defendant's conduct. What dangers did his conduct create? Does this injury come within the scope of that risk? Strict liability in tort of the *Rylands v. Fletcher*[8] type—strict liability in connection with an abnormally dangerous activity—was the original strict liability in tort, and an examination of this type of case shows that strict liability does not take care of the proximate cause problem. When the plaintiff is not called upon to prove fault on the part of the defendant, who is liable whether he is at fault or not, courts have enforced risk restrictions even more stringently than in negligence cases. In other words, the circle of liability for strict liability becomes a smaller circle than that for negligence, where the defendant was really at fault. Take the case of an elephant getting loose. A horse sees him and starts climbing a tree. Is that within the scope of the risk created by the elephant keeper? Is that a reason to impose strict liability for the keeping of elephants? The courts have disagreed, but they have approached the question from a consideration of the scope of the risk.

This same approach may well be used in connection with strict liability in tort for products. Here, too, the circle of liability for strict liability is somewhat narrow. Indeed, it has appeared to me that in some types of cases, such as the second-accident situation, a plaintiff might be better off, if he has the choice, to sue on the basis of negligence, because of the wider circle of liability. At issue in negligence is foreseeability, rather than intended use, one of the stumbling blocks of strict liability, as illustrated by such cases as *Evans v. General Motors Corp.*[9] Intended use as an issue originally

[8]L.R. 3 H.L. 330 (1868).
[9]359 F.2d 822 (7th Cir. 1966).

came out of breach of warranty actions in which the suit was brought because the product did not perform in accordance with expectations. Merchantability, or suitability for the purpose for which the product is intended to be used if disclosed, is of particular significance in these cases. Defendants began by discussing intended use as though the issue were confined to the intent of the manufacturer, and of course the manufacturer did not intend his automobile to be used for just *any* purpose, much less for another automobile to be run into it. The courts began to expand the concept a little beyond that, to something like normal use, then perhaps to something like expected use, and then it was expanded to include a foreseeable use. Once one gets to foreseeable use, the liability is becoming as broad as that for negligence. The courts have not analyzed this problem thoroughly; the relationship between foreseeability and proximate cause is not fully settled.

In connection with proximate cause, problems also arise in regard to intervening causes—acts of third parties, natural forces, etc. Here again, in cases based on the *Rylands v. Fletcher* type of strict liability, courts have been more inclined to cut off the defendant's liability because of the intervening act of a third party or because of an act of God, than they would in an action based on negligence. It is not certain that this attitude will carry over to strict liability for products, but this could be another consideration for a plaintiff, another reason why he might be better off to base his action on negligence. The articles in this symposium indicate other reasons why a plaintiff may choose to sue in negligence, including the opportunity in a negligence action to introduce evidence about the blameworthiness of the plaintiff. That may make a very real difference in determining the scope of liability and proximate cause, and will almost certainly affect proof of negligence.

IV. DEFENSES

A. Plaintiff's Fault

The next item to be considered is plaintiff's fault. Much of the material in the symposium is devoted to this issue and that is indicative of the fact that the problem of how to handle plaintiff's fault is the most pressing problem in the current state of the law of products liability. The solution I would like to offer is that we adopt some form of comparative fault. The trouble with contributory negligence, assumption of risk, and other common law approaches to the problem of plaintiff's fault is that they go on the premise that everything is black and white—the plaintiff gets everything or he

doesn't get anything; there is no in between. These approaches are derived from old common law pleading. The common law never compromised anything, because compromise was to be used in equity, which was not regarded as real law. Equity courts, growing out of the ecclesiastical courts, were believed to compromise because they didn't know the real law. Common law pleading was based on the idea that everything should be reduced to an issue that could be answered yes or no. The answer could not be maybe, or yes if; it had to be yes or no, and law courts did not deign to look at the possibility of something in between. That attitude, especially as displayed in the common law doctrine of contributory negligence, produces rank injustice. Some commentators say it all averages out under the contributory negligence system with its numerous exceptions, and maybe if you average them up the cases as a group work out all right, but that means every single case is bad. The average has nothing to do with working things out properly in any individual case.

In this situation, without comparative negligence, a plaintiff doesn't bring his suit in negligence if he is at fault in the slightest degree. He must rely on strict liability and, perhaps even more, on breach of warranty. In strict liability ordinary contributory negligence of the mere inadvertent type has not customarily barred recovery. On the other hand, contributory negligence in which plaintiff discovered the defect and continued using the product despite ample opportunity to stop using it—sometimes called assumption of risk—has been a complete bar to recovery. Then the parties came up with the idea of misuse, and misuse is an idea easily misused, as I will indicate in discussing it a little later. The final approach to plaintiff fault is comparative fault, the approach I think should be applied to strict liability for products. It should apply in this situation to achieve a more equitable, balanced judgment.[10]

B. Other Defenses

We could discuss problems connected with statutes of limitations at great length. We have all been holding our breaths to see what happens to the proposals before the legislature of Indiana.[11] Immuni-

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[10]The new Uniform Comparative Fault Act, promulgated in 1977, applies the comparative-fault approach to an action of strict liability for products as well as to one for negligence.

[11]The Indiana General Assembly had before it two bills which would have set a statute of limitations in products liability cases, but the provisions were not passed. Ind. H.R. 1959, 100th Gen. Assem., 1st Sess. (1977); Ind. S.70, 100th Gen. Assem., 1st Sess. (1977).

ty is another defense, arising most often in connection with worker's compensation, since the employer is not liable in tort to the employee if worker's compensation applies. Release and settlement are defenses discussed in the symposium.

We have not examined the UCC defenses, which were responsible for the holding in *Greenman v. Yuba Power Products, Inc.*[12] The UCC provides for notice of defect within a reasonable time.[13] That requirement is easily complied with in a strictly commercial transaction, where the suit is for failure of the product to perform properly. The buyer must give notice so that the seller has an opportunity to replace the defective product with a good one. But a provision for notice really is not applicable to a case in which the plaintiff is injured; you can't replace the person. And so in *Greenman v. Yuba*, that was the very reason the court held that strict liability in tort would apply, and the notice requirement was eliminated in the tort action. Another problem is disclaimer. How broadly liability may be disclaimed in connection with used products is something that the courts still have to determine.

V. Interests Protected

Another substantial problem is the question of interests protected by the tort action. Obviously included as an interest protected is physical injury to person or property. A plaintiff may also generally recover for the economic loss derived from the physical injury, such as loss of wages and medical bills. Although those items are economic loss, there is no trouble about them. The impediment to recovery of economic loss comes in connection with damages resulting from the fact that the product did not do what it was supposed to do. There is a split among the courts on this issue. The majority rule is that the tort action does not lie here, that this is really a claim for breach of contract and should be determined by contract rules. The minority rule, led by the New Jersey court in the *Santor* case,[14] would hold that the tort action applies to this situation and recovery for economic loss should be granted. My own view is that the opinion of the California court in *Seely v. White Motor Co.*,[15] holding that the claim sounds in contract, is probably the better position.

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[12]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[13]U.C.C. § 2-607(3).

[14]Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[15]63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). *See also* my article cited in note 4 *supra*.

VI. Parties

A. Privity

I must make only a brief reference to the problems as to parties. One problem involves privity. From the standpoint of the defendants, or "vertical privity," the theory of the suit may make a difference. In a suit for negligence, a wholesaler or retailer may not be negligent and so not liable. In breach of warranty, the requirement of privity may still remain. In strict tort liability, section 402A would impose liability on all parties, but some jurisdictions may disagree in the case of a wholesaler.

From the standpoint of plaintiffs, the major question is whether a bystander can recover. For lack of authority this was the subject of a caveat to section 402A. But today, it is clear that recovery in strict tort liability is available to the bystander.

B. Contribution and Indemnity

Indemnity was consistently allowed at common law. One of the usual situations where it applied was in the case of a retailer (or wholesaler) held liable without negligence, who sued the negligent manufacturer. Though contribution was not allowed at common law, most states permit it today through statutes or judicial decision. In a state where contribution is based not on pro rata distribution but on the relative fault of the parties, the distinction between contribution and indemnity has become less meaningful and there are indications that they may be beginning to merge.[16]

VII. Some Special Problems

A. Misuse

Let me come back now to talk about some of the special problems that cut across several elements previously treated. I begin with the concept of misuse. The issue of misuse can be placed in three different places in this discussion, and how it is handled may depend upon where one locates it. Misuse may be raised in determining whether a product was not duly safe, in determining

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[16]*See, e.g.*, Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). On the topic in general, see Phillips, *Contribution and Indemnity in Product Liability*, 42 Tenn. L. Rev. 85 (1974); Wade, *Contribution and Indemnity in Products Liability Cases*, 27th Ann. Miss. L. Inst. 115 (1972).

whether the condition of the chattel was a proximate cause of the plaintiff's injury, or as a separate affirmative defense to the effect that the plaintiff was at fault. The choice of where to raise the issue makes possible a real difference in the outcome of the case, and both sides should be aware of the tactics involved. Consider the Texas case[17] in which a man had read consumer literature, in which he was told that if he bought a tire a size larger and kept it well inflated it would last longer. He followed the instructions and some time later his wife and children were driving in the car when one of the tires went flat and then another one blew out. The wife completely lost control and they were all hurt. In an action brought against the tire manufacturer, the court talked about plaintiff's misuse of the product, using too large a tire and having it too greatly inflated. If you analyze this problem properly, I think you will decide that the real issue is whether that tire was unreasonably dangerous. If we assume that the manufacturer was not the one who put the tire on the car, the situation is like the early case in which a woman with a size seven foot bought a size five shoe, wore it a while, got some blisters and sued the shoe manufacturer.[18] That was back in the earlier days when they talked only about negligence and it's obvious that the shoe manufacturer was not negligent in making a size five shoe. There should of course be no liability if the defendant did not put out an unreasonably dangerous product. Similar considerations arise if the concept of misuse is treated in terms of proximate cause: what is the risk of making these shoes in a size five? If the issue is put in terms of plaintiff's fault it is then one of assumption of risk or contributory negligence or comparative negligence. Defendant must be alert to this defense and to the tactic of switching the focus and talking about whether the plaintiff was contributorily negligent and thus perhaps being able to recover in an action based on strict liability, even though the product was not unreasonably dangerous at all. Conversely, in a case where the product was actually unreasonably dangerous and the plaintiff's contributory negligence was of the mere inadvertence type, a defendant may be able to bar recovery by invoking the talismanic concept of misuse. This concept is one by which a party may lead the other, and even the court, astray if they are not careful to analyze the way in which it is used.

B. Warnings

Both the plaintiff and the defendant may find warnings as potential devices in their favor. The plaintiff believes that if he cannot

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[17]McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

[18]Dubbs v. Zak Bros. Co., 38 Ohio App. 299, 175 N.E. 626 (1931).

prove that there was something wrong with the product he can point to the failure to warn of danger and that will be easy to prove. The defendant thinks, if his product is not as safe as it ought to be, that he can put up a warning and call attention to the danger and then it will be duly safe. How should the problems of warnings be analyzed? It seems to me that these problems are so closely analogous to those related to obvious dangers that they should be handled in the same way. When we are dealing with plaintiffs who come on the defendant's premises, the question is whether a warning of a danger is adequate to make the premises reasonably safe. A warning may be adequate or inadequate, depending on whether the defendant acted with reasonable care to make the situation or the product safe.[19] As a product example, suppose an electric appliance manufacturer failed to insulate the electric cord attached to the appliance adequately, but added a sign that said, "Be careful when you plug this in. Do not touch the wires. Doing so might electrocute you." Even if the manufacturer used language that emphatic, do you suppose that any court would hold the warning sufficient to make the product duly safe? A decision must be made on whether the existence of a warning is adequate or whether it is necessary to take reasonable action to make the product safe. A warning should be held sufficient only when it is really not feasible to make the product safe and the danger is not obvious.

Of course there are other problems in connection with warnings, including the manner in which they are expressed. What things do you need to warn about? Must the defendant think of every possible difficulty? Suppose a perfume, if swallowed, might make someone sick. Must the manufacturer add a warning, "Do not ingest"? What if a child is involved? Another problem concerns determination of whether the absence of a warning was a cause in fact of the injury incurred. There have been cases in which the plaintiff admitted he hadn't read any of the instructions attached to the product and then, of course, the lack of a warning doesn't make very much difference. But does it make *any* difference?[20] If the plaintiff had seen a warning, would he have followed it? What is the relationship between warnings and instructions? Do instructions suffice, or is a warning about what will happen if instructions are not followed also necessary? The ramifications in this connection are considerable, indeed.

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[19]*Cf.* Wilk v. Georges, 267 Or. 19, 514 P.2d 877 (1973); RESTATEMENT (SECOND) OF TORTS § 343A (1965).

[20]*Cf.* Technical Chemical Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972).

C. Express Warranty

Express warranties raise a number of unique questions. The warranty can be salvation for a plaintiff. He may not be able to prove that the product was unreasonably dangerous, but if he can find an advertisement or brochure that includes a statement about some quality of the product, and this quality had anything to do with his injury—he might even contend that this statement was the only reason he bought the product—then he can claim he would not have been injured if he had not seen the manufacturer's statement. This consideration is of particular importance to a manufacturer who wishes to avoid litigation. One of the worst things a manufacturer can do is to put his product in the hands of professional advertisers and let them overclaim, presenting the object as extraordinarily attractive. That can create liability for manufacturers more often than a product that is unreasonably dangerous.

Two theories have been used to allow recovery for breach of an express warranty. One is section 402B of the *Restatement (Second) of Torts*, a section that is not nearly as well known as section 402A. Section 402A covers cases involving breach of implied warranty and bases recovery on strict liability in tort. Section 402B covers cases involving express warranties and calls the theory of recovery a tort action for misrepresentation. It may even be innocent misrepresentation; a claim will lie if physical injury results. That is not the majority approach, but it has been used in a number of states.[21] The majority approach is to say that this sort of case is a tort action based on express warranty. Middlemen, including suppliers and retailers, are treated as mere conduits, if the advertising statements are directed at the buying public. If the plaintiff saw the advertisements and read them he is entitled to rely upon them and to hold the manufacturer liable because they were directed at him. Once again, however, it is important to remember that cause in fact must be shown: the plaintiff must show that he saw the advertisement, that he read it and that it was influential in inducing him to buy the product.

D. Second-Accident Cases

These cases arise when the dangerous condition of the product had nothing to do with initially producing the accident, but once the accident had occurred made the injuries worse. The situation can be discussed in all sorts of ways. I suspect that the best place to con-

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[21] *E.g.*, Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

sider it is in relation to proximate cause. Is this occurrence within the scope of the risk created by the defendant? In this connection it seems to me that the *Larsen* case[22] is far better reasoned than the *Evans* case.[23] The *Larsen* court said that it is expectable that an automobile may be in a collision, and a manufacturer should use reasonable care to design an automobile reasonably safe from this standpoint. We say reasonable care, because it is not necessary to design an absolutely safe product. To make an automobile fully crashworthy it would be necessary to design a tank, and a tank would be unreasonably dangerous to people outside that vehicle. Thus it cannot be designed to be absolutely safe. What the manufacturer must do is to consider all potential dangers and to use reasonable care in creating the design of his product.

As a matter of fact, when it comes to design cases and warning cases, there is no real difference between actions in negligence and in strict liability in tort. Strict liability in tort is of primary benefit to a plaintiff in an assembly-line error case when the manufacturer was not at fault in letting it happen or failing to discover it. In bad design cases the theory relied on may affect the treatment of plaintiff's fault or the liability of a wholesaler or a retailer who does not know of the dangers created by the design; but so far as the manufacturer is concerned, in most cases based on bad design or lack of warning there is no real difference between an action based on negligence and one founded on strict liability in tort.[24]

E. The Unavoidably Dangerous Product

Finally, consider the effect of calling a product unreasonably dangerous or not duly safe. It seems to me that these words—"unreasonably" and "not duly"—afford the courts a considerable amount of discretion in many cases. Take the cases involving blood transfusions. Assuming that there is no way to discover the hepatitis germ and no way to eliminate it and that the blood is urgently needed, it would be perfectly proper to hold that blood containing hepatitis germs is not an unreasonably dangerous product. Courts differ, but it is much better to tackle the problem directly than to use the procedural dodge of saying that what is involved in the blood transfusion is not a sale but the rendering of a service. With other things, however, a determination could more easily be made, defining "unreasonably dangerous." Thus a common garden

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[22]Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

[23]Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966).

[24]*Cf.* Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033 (1974).

tool like a hoe may be dangerous to human toes, but its usefulness, common design and fully apparent dangers make it fairly clear that the hoe is not unreasonably dangerous. Conversely, large firecrackers may be easily recognized as not duly safe. Other articles are between. Take the problem of allergies. There is probably no product that no one will be allergic to. But this is a situation in which a warning—an indication of the product's ingredients—may make a difference. This is also a case in which the negligence approach will probably protect plaintiffs adequately.[25]

VIII. Conclusion

We are never going to reach the point where we say that there is true absolute liability, the insurer's type of liability. If we did, Ford Motor Company would be liable for every accident a Ford got into, Diamond Match Company would be liable for every fire that was started by a Diamond match, Bayer Aspirin Company would be liable for every stomach hemorrhage or even stomach upset produced by its aspirin tablets, the dairy farmers would be liable for heart attacks produced by cholesterol and the Indianapolis Water Company would be liable if someone drank too much water and died. There is no product that is not dangerous to somebody if it is used in some particular fashion. Lines have to be drawn and distinctions made.

When strict tort liability for products first developed, some lawyers thought that the problems of the plaintiffs' attorneys were all solved for them in advance and that defendants' attorneys had no grounds to stand on. A great judge declared privately that the law of torts was now destined to wither away in significance as a result and that a legal scholar ought to find other fields of the law to which to devote his energies.

They were all wrong. Since that time the number of appellate court decisions on products liability has increased geometrically, and there have been more disputes, treatises, symposia and law review articles to explain the intricacies than in any field of tort law. This article has attempted to provide an overview of the problems, but it has perforce been woefully shallow and incomplete.

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[25]In my article, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973), I attempt to compile and explain the factors that should be taken into consideration in making a determination whether a product is unreasonably dangerous. I also treat the issue of whether the determination should be made by judge or jury.

The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions

DAVID G. OWEN*

I. INTRODUCTION

"[T]he law does, in general, determine liability by blameworthiness . . . ."[1] When Oliver Wendell Holmes wrote these words in *The Common Law* in 1881, the fault basis of accident law was at its height. Yet the rules of accident law in the late nineteenth century had only recently emerged from a tradition that was centuries old and fundamentally strict. Nor would many years pass before the foundations of accident law would begin to shift away from fault back in the direction of strict liability.[2] Playing a major role in this latter development was the law of products liability.[3] Today, products liability law is principally based on strict liability.[4]

In viewing this development one might well be tempted to conclude that accident law should no longer concern itself with "fault" or "blame"—that its experiment with such concepts should be viewed only as a digressive flirtation with Victorian moralistic notions that have no place in an enlightened system of law. But there is a different view of the evolution of the law of torts: that, even prior to the development of the negligence action, liability had important roots in the concept of fault.[5] Holmes himself subscribed to this in-

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[1]O. HOLMES, THE COMMON LAW 108 (1881) [hereinafter cited as O. HOLMES].

[2]These developments have been traced elsewhere. *See, e.g.*, Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); James, *Analysis of the Origin and Development of the Negligence Actions*, in U.S. DEP'T OF TRANSPORTATION, THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION (1970); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970).

[3]The first such cases were brought in warranty and involved the sale of defective food. *See, e.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

[4]Liability for selling defective products is "strict" under U.C.C. §§ 2-313, 2-314, 2-315 (1972 version), and RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965).

[5]"[D]espite the initial dominance of the idea of strict liability, there was evident almost from the beginning an intuitive concern by courts for the defendant's blameworthiness or lack of it." Malone, *supra* note 2, at 44.

terpretation of tort law history.[6] And while fault has indeed experienced a rather spectacular eclipse in accident law in recent years, especially in the products liability area, there is no reason to conclude that blameworthiness has become irrelevant to the resolution of tort cases generally,[7] or products liability cases in particular.[8]

Elsewhere I have examined the role of fault in determining damages for aggravated misconduct, particularly in the products liability context.[9] The purpose of the present article is to explore the effect of aggravated fault on the central rules of liability[10] and defense[11] in products liability litigation.

It is axiomatic in tort law that a person will not be held responsible for all harm attributable to his actions. Rules of duty, causation, defense, and damages all operate in balance to restrict the scope of a defendant's legal responsibility for his damaging conduct. The total structure of such rules operates to accommodate various interests of the injurer, the injured, and society at large.[12] But lending support to this balanced structure of rules is the premise, true in perhaps most accident cases, that the defendant's damaging conduct was only inadvertent. As strict liability for product and other accidents has developed in recent years, imbalances in the classic negligence structure of the rules have been perceived, and adjustments have been made.[13] An imbalance in the structure of liability rules and defenses is also created when the defendant's actions,

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[6]*See* O. HOLMES, *supra* note 1, at 88-107.

[7]*See* Kelly, *The Inner Nature of the Tort Action*, 2 IR. JUR. 279 (N.S. 1967); Veitch & Miers, *Assault on the Law of Tort*, 38 MOD. L. REV. 139 (1975).

[8]While the negligence theory of liability is of course predicated on a form of blameworthiness, this article will discuss the effects of aggravated fault on other rules of liability and defense in products liability cases.

[9]Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976) [hereinafter cited as Owen, *Punitive Damages*].

[10]The central issues of liability that will be discussed are defectiveness, cause in fact, and proximate causation.

[11]The defenses to be discussed are contributory negligence, comparative negligence, assumption of risk, and product misuse.

[12]*See* O. HOLMES, *supra* note 1, at 144.

[13]Thus, for actions brought in strict tort, most states have eliminated the contributory negligence defense and have narrowed the defense of assumption of risk. *See* text accompanying notes 90-96 and 104-16 *infra*. In many states the defense of contributory negligence has been abolished and proximate cause limitations liberalized in the plaintiff's favor in actions against possessors of animals, RESTATEMENT (SECOND) OF TORTS §§ 515(1), 510 (Tent. Draft No. 10, 1964), and for abnormally dangerous activities, *id.* at §§ 524(1), 522. And of course major changes have been wrought by the workmen's compensation laws in the nature of the employee's rights concerning job-related accidents. *See, e.g.*, Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349 (1976).

lying at the other end of the culpability scale, fairly can be characterized as "flagrant," "willful and wanton," or "reckless." Here too certain limited reaccommodations have been made in the general tort law rules outside the products liability area to correct the resulting imbalances in the classic structure.[14]

The thesis of this article is that the imbalance in the rules created when a manufacturer acts recklessly, in flagrant disregard of consumer safety, should be rectified in order to maintain a fair accommodation of interests between the manufacturer and consumers. It is proposed that the scope of a manufacturer's legal responsibility for injuries from its defective products should reflect the measure of its culpability for marketing such products; that is, as blameworthiness increases, so should liability. This can be accomplished by broadening certain rules of liability and by narrowing certain rules of defense. It will be seen that the two general tort law rules to such effect—one pertaining to proximate cause[15] and the other pertaining to contributory negligence[16]—are logically applicable to the products liability context. Possible changes in certain other products liability rules will also be considered for use in the context of highly blameworthy marketing misconduct.

There is apparently no case law examining what effect a manufacturer's aggravated misconduct should have on the normal rules of liability and defense.[17] This is probably attributable to at least two factors. First, manufacturers generally do act responsibly in manufacturing and marketing their products and only infrequently act in a manner that is highly blameworthy or "reckless." Second, a body of products liability principles has begun to mature only in the past ten or fifteen years.[18] Over this time, most of the attention

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[14]*See* notes 15 and 16 *infra* and accompanying text.

[15]*See* notes 76-89 *infra* and accompanying text.

[16]*See* notes 90-96 *infra* and accompanying text.

[17]Research has uncovered only one reported products liability decision which even raises the issue, and the reference is in a footnote to the dissenting opinion. *See* Ussery v. Federal Laboratories, Inc., [1973-1975 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 7084, at 12,479 n.4 (4th Cir. 1973) (Winter, C.J., dissenting) (opinion withdrawn by order filed March 31, 1975).

[18]The seminal cases that spearheaded the modern development of products liability law were decided in 1960 and 1963. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The predominant treatise on products liability, L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (1976), was first published in 1960, and the first edition of the other treatise in the field, R. HURSH (now with H. BAILEY), AMERICAN LAW OF PRODUCTS LIABILITY (2d ed. 1974), was published one year later. The first Canadian text, S. WADDAMS, PRODUCTS LIABILITY, was published in 1974, and the first English text has just been published. C.J. MILLER & P. LOVELL, PRODUCT LIABILITY (Butterworths 1977).

of the courts and commentators has been focused in the other direction—on the central issues of the nature and reach of strict liability in tort and its defenses. Little thought has been devoted to the more peripheral and infrequent problems such as the one under discussion. Yet such problems must be addressed as the discipline develops, and hypotheticals can be used in lieu of decided cases as the basis for discussion.

II. "Highly Blameworthy" Conduct in the Products Liability Context

The thought of a manufacturer's acting in a manner that is "blameworthy" or, especially, "highly blameworthy" is foreign to the traditional thinking of many persons in a free enterprise system such as ours. Certainly the affairs of manufacturing enterprises rarely, if ever, are conducted with the type of ill will or malice that characterizes the most culpable forms of human misbehavior. Indeed, manufacturing enterprises usually exist to generate a profit by making and selling goods—a singularly neutral, indeed beneficial, purpose and form of activity. Why and how, one may ask, would such enterprises ever act in a manner properly classifiable as "willful and wanton"?

The "why" part of the question in many cases is answered easily: to increase profits. In most other cases the explanation probably lies in the manufacturer's simple indifference to the safety attributes of its products.[19] The "how" part may be demonstrated by examining some cases.

Perhaps the classic case of manufacturer misbehavior was Richardson-Merrell's marketing in the early 1960's of MER/29, a drug supposed to reduce the level of blood cholesterol[20] and hence to reduce the incidence of heart attacks and strokes. From the start, the company's animal tests of the drug clearly indicated its potential danger, particularly to the subject's eyes. Yet in order to expedite the marketing of a drug that promised to be especially profitable, the company perpetrated a major fraud on the public. First, it submitted false test data to the Food and Drug Administration to obtain approval to sell the drug; then, to improve the drug's marketability, it lied about the drug's contraindications to its salesmen and the medical community.[21]

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[19]For an explanation of how the sale of defective products can be profitable, see Owen, *Punitive Damages, supra* note 9, at 1292-95. See *id.* at 1361-71 for an examination of the notion of flagrant indifference to consumer safety.

[20]There was some doubt that it did. *See* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 694, 60 Cal. Rptr. 398, 403 (1967).

[21]For a full description of Richardson-Merrell's conduct in the development and marketing of MER/29, see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir.

A more recent example involves the marketing by the A.H. Robins Company of the Dalkon Shield, an intrauterine contraceptive device. Similar to the MER/29 situation, this manufacturer also hurried its product to the market in an attempt to reap substantial profits.[22] Misleading advertising[23] helped to stimulate a successful sales campaign.[24] But before long, the company found itself faced with a congressional investigation[25] and hundreds of lawsuits.[26] The reason for both was that users of the IUD incurred substantial risks of injury, sometimes fatal, which the manufacturer had failed to discover because its patently inadequate testing generated favorable but very inaccurate results.[27]

A final example of a manufacturer's acting in reckless disregard of consumer safety involves the design and marketing of an "uncrashworthy" automobile by General Motors. The plaintiff's decedent was killed when struck in the neck by the hood of his car which penetrated the windshield following a head-on collision. Despite its knowledge of over a hundred instances of windshield hood penetration from the same design that had resulted in disfigurement,

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1967); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968). The juries in both *Roginsky* and *Toole* rendered compensatory and punitive damages verdicts against the defendant, although the punitive damages verdict in the former case was reversed on appeal in a split opinion.

[22]The mark-up by manufacturers generally in the sale of IUDs to physicians is reported to have averaged nearly 1000 percent. *See Regulation of Medical Devices (Intrauterine Contraceptive Devices): Hearings Before the Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess. 58 (1973) (testimony of Russell J. Thomsen, M.D.) [hereinafter cited as *Hearings*].

[23]The company is reported to have engaged in a deceptive promotional campaign based upon the results of patently deficient tests. "[T]he Dalkon Shield and its promotion provide the classic example of the misuse of statistics to market an item." *Id.* at 61. *See id.* at 61, 62, 74-76, 83-94. *See generally* M. DIXON, DRUG PRODUCT LIABILITY § 11.43 (1975); Note, *The Intrauterine Device: A Criticism of Governmental Complaisance and an Analysis of Manufacturer and Physician Liability*, 24 CLEV. ST. L. REV. 247 (1975); Comment, *Up Against the (Uterine) Wall: An Analysis of the Liability of Birth Control Products Manufacturers*, 2 S. ILL. U.L. REV. 498 (1976).

[24]By June 28, 1974, when A. H. Robins suspended distribution of the Dalkon Shield, the product had been inserted into approximately 2.2 million women in the United States. *In re* A. H. Robins Co., "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540 (J. P. M. D. L. 1975).

[25]*See Hearings*, *supra* note 22.

[26]It was reported over a year ago that more than five hundred actions had been filed against A. H. Robins Company for injuries caused by the Dalkon Shield. Wall St. J., Feb. 19, 1976, at 6, col. 2 (midwest ed.).

[27]*See Hearings*, *supra* note 22, at 61, 62, 74-76, 83-94. For a full account of the intrauterine contraceptive device problem in general and A. H. Robins' activities concerning the development and marketing of the Dalkon Shield in particular, see authorities cited in note 23 *supra*.

paralysis, and even decapitation, General Motors reportedly had not altered the design nor even warned of the danger.[28]

In each of these cases, the manufacturer's behavior was highly blameworthy.[29] Each of the three cases, however, represents a different form of misbehavior.[30] The MER/29 case exemplifies active deception of the public concerning a product's dangers. The Dalkon Shield case illustrates a reckless failure to discover a product's dangers. The uncrashworthy car case shows a reckless failure to remedy a dangerous condition known to be defective.

Yet despite the differences in these forms of misbehavior, each one deserves classification as "reckless," "oppressive," "willful and wanton," or "in conscious disregard of consumer safety." Probably the most descriptive phrase encompassing all three forms of marketing misconduct is "flagrant indifference to the public safety." This is the standard I have advanced for manufacturer punitive damages liability,[31] and it appears to be equally well suited to a reformulation of the rules of liability and defense in cases of flagrant marketing misbehavior. The principal characteristic of the conduct described in the standard is the manufacturer's gross abuse of its position of control over product danger information. It is behavior far more culpable than negligence,[32] reflecting a callous sacrifice of consumer interests for the benefit of the enterprise.[33] This is the nature of aggravated blameworthiness in the products liability context.

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[28]These facts laid the foundation for an unreported case against General Motors seeking compensatory and punitive damages that was settled before trial. Wallace v. General Motors Corp., No. WPB-75-65-Civ-CF (S.D. Fla. 1975). *See* Owen, *Punitive Damages*, *supra* note 9, at 1328 n.334.

[29]For other case examples of highly blameworthy manufacturer behavior, see Owen, *Punitive Damages*, *supra* note 9, at 1325-61.

[30]The following textual discussion of aggravated manufacturer misbehavior draws substantially upon Owen, *Punitive Damages*, *supra* note 9, at 1361-71.

[31]*Id.* at 1367.

[32]I am basically advocating a system in which the culpability of the defendant does not become relevant until it so substantially exceeds negligence as to reflect a different *kind* of misbehavior as well as degree—one that can fairly be called "flagrant," "oppressive," or "reckless." However, culpability in any degree should probably affect the apportionment of damages reduced on account of the misconduct of the plaintiff. *See* notes 97-103, 116, and 126 *infra* and accompanying text.

[33]The standard for determining reckless misconduct is often properly held to be objective. *See, e.g.*, Williamson v. McKenna, 223 Or. 366, 395-400, 354 P.2d 56, 69-71 (1960); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15, at 953-55 (1956). *See generally* Owen, *Punitive Damages*, *supra* note 9, at 1362-69. Not all courts agree. *See* 2 HARPER & JAMES, *supra*, § 16.15, at 49-51 (Supp. 1968). Although the standard of misconduct should probably be objective, evidence of the defendant's state of mind—consciousness of defectiveness in the products liability context—should nevertheless be admissible. *See* 2 HARPER & JAMES, *supra*, § 16.15 at 956-57; Owen, *Punitive Damages*, *supra* note 9, at 1369-70.

III. DEFECTIVENESS

The central issue of liability in many products liability cases is the defectiveness *vel non* of the product. For purposes of the present discussion the question is whether the aggravated blameworthiness of a manufacturer in marketing a product should affect the determination of whether it is deemed "defective." Because the conduct of the defendant as well as the defectiveness of the product is properly in issue in fraud and negligence cases, evidence of culpability is, of course, pertinent and goes to the essence of the cause of action. Yet the "strict" theories of products liability purport to direct attention away from the conduct of the manufacturer to the safety of the product within its environment of use.[34] Whether then a manufacturer's culpability may ever properly be considered on the liability issue in such cases will be examined in this section.

As a general principle, the manufacturer's blameworthiness in marketing a product in a particular condition probably should not be considered in determining the defectiveness of that condition.[35] The two concepts generally are unrelated. Either the product was manufactured according to specifications, or it was not; its design was adequately safe, or it was not; its warning adequately informed consumers of a hidden danger, or it did not. While these questions of defectiveness are often complex, involving the consideration of many factors,[36] the manufacturer's culpability in marketing the product in an injury-producing condition generally should not be one of them. Defectiveness is normally determined,[37] depending on the court, either on the basis of the consumer's reasonable expectations[38] or on

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[34]*See, e.g.*, Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 808-09 (1976); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 429 (1974) [hereinafter cited as Weinstein *et al.*]. The fact that the theory of recovery pleaded is "strict" should not impede consideration of the effect that a manufacturer's aggravated blameworthiness should have on the rules of liability and defense. *Cf.* Owen, *Punitive Damages*, *supra* note 9, at 1268-77.

[35]*But cf.* notes 40-42 *infra* and accompanying text.

[36]*See, e.g.*, Montgomery & Owen, *supra* note 34, at 814-19; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 837-38.

[37]In manufacturing flaw cases, as a practical matter at least, defectiveness is usually determined on whether the product in fact contained a flaw. *Cf.* Montgomery & Owen, *supra* note 34, at 818-19 n.51. But even this determination can be difficult. *See* Weinstein *et al.*, *supra* note 34, at 430-33 n.11.

[38]*See, e.g.*, Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, i (1965).

a risk-benefit or cost-benefit analysis.[39] Blame does not appear to be relevant to the issue.

The issue, however, is not always quite so clear. For one thing, those courts that use a *risk*-benefit method for determining defectiveness are relying at least in part upon the traditional negligence standard of liability which is rooted in the notion of blameworthiness.[40] If a court uses a *cost*-benefit approach, however, the manufacturer's actual blame in marketing the product in its offending condition will not be in issue at all since full knowledge of the harmful effects of the condition will be imputed to the manufacturer in any event under the theory of liability.[41] Nevertheless, some juries and perhaps even some courts will probably mistakenly consider blame to be relevant to the cost-benefit defectiveness determination. This is because the fact finder in some jurisdictions is asked to decide if the manufacturer would have been *negligent* in marketing the product in a particular condition if it had known of the injuries that would be caused as a result.[42]

Blame may creep into the defectiveness determination in another way. In difficult cases, defectiveness as a duty issue can become entangled in the other basic duty issue of proximate cause—both of which serve as vehicles for defining the scope of liability. As will be discussed below,[43] the normal rules of proximate cause may properly be stretched in cases of aggravated marketing misconduct. Thus, sometimes indirectly, blame may become relevant to the outcome of the duty issue whether it is framed in terms of defectiveness or of proximate cause. Moreover, as a practical matter in a case in which the adequacy of the design or warning is a close question, the jury will usually be tempted—and perhaps not inappropriately so—to tip the balance against a highly blameworthy manufacturer.

For example, suppose that as in *McCormack v. Hankscraft Co.*[44] a small child accidentally knocks over a vaporizer and is severely burned by the boiling water that gushes out. Even if it is shown

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[39]*See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Helicoid Gage Div. of Amer. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App. 1974).

[40]*See generally* Owen & Montgomery, *supra* note 34, at 824-29. Nor is this conclusion altered by the fact that the court may consider some additional factors, such as the manufacturer's ability to insure or spread the loss, not pertinent to a negligence determination. *Cf. id.* at 818; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

[41]*See* Montgomery & Owen, *supra* note 34, at 843-45.

[42]*Id.*; Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974).

[43]*See* text accompanying notes 76-89 *infra*.

[44]278 Minn. 322, 154 N.W.2d 488 (1967). In the Hankscraft vaporizer the water apparently looked still and did not appear to be boiling. *Id.* at 331, 154 N.W.2d at 496.

that the injury would have been prevented had the vaporizer top been threaded to screw onto the water container, or that it might have been averted if a warning had been given that the water was scalding hot, the defendant manufacturer might nevertheless interpose the defense that the danger was open and obvious.[45] Although this rule is breaking down,[46] some courts still hold as a matter of law that a product is not defective if the danger is obvious.[47] Assuming that the danger was obvious, *i.e.*, that boiling water was visible inside the glass container, a court following the obvious danger rule—or one applying a consumer expectations test of defectiveness—would be hard-pressed not to dismiss the case.[48] Suppose further, however, that while the manufacturer knew of a dozen other cases of severe burns caused by its vaporizers tipping over on small children in a similar manner,[49] it had nevertheless failed either to eliminate the hazard by threading the top or even to reduce it by giving a warning.

On such facts, the defectiveness determination by a court or jury might well be influenced by the blameworthiness of the manufacturer's inaction in the face of a known and serious danger.[50] Thus, despite the usual irrelevance of blameworthiness to the question of defectiveness, evidence of a manufacturer's gross irresponsibility may in some cases influence the determination of that issue.

IV. CAUSATION

In any discussion of the role of causation in tort law, it is helpful to isolate the issue of cause in fact from that of proximate causation.[51] While the two concepts frequently overlap and are often

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[45]*See id.* at 337, 154 N.W.2d at 496.

[46]*See, e.g.*, Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), abrogating the obvious danger-no duty rule of Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). *See generally* Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973).

[47]*E.g.*, Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973).

[48]In *McCormack*, the court held that the danger was not so obvious as to bar recovery. 278 Minn. at 333, 335, 154 N.W.2d at 496, 498. A court applying a consumer expectations test to determine the vaporizer's defectiveness would probably consider the expectations of the parents rather than of the child. *See* Bellotte v. Zayre Corp., 116 N.H. 52, 352 A.2d 723 (1976). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

[49]*See* 278 Minn. at 330, 154 N.W.2d at 495.

[50]The manufacturer's culpability will be even greater in such a case if, as in *Hankscraft*, it touts the safety of its product when it knows of a serious danger in the product. *See* 278 Minn. at 330, 154 N.W.2d at 495.

[51]*See generally* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

treated indiscriminately by the courts,[52] precise analysis requires that they be examined separately. This is particularly true where the context of their consideration is the blameworthiness of the defendant's behavior, since the law has treated them differently in this area.

A. Cause in Fact

Considered in the abstract, the determination of whether a plaintiff's injuries are in fact attributable to a product defect is logically unrelated to the manufacturer's blameworthiness in marketing the product in that condition. As one court said in a recent products liability case, "It is inconceivable that anyone should be held civilly liable for an injury which he did not cause, whether he be charged with negligence, intentional wrongdoing, or conduct giving rise to absolute liability."[53] The metaphysical notion of cause and effect thus appears to be a closed system concerning only the relationship of an action to events following thereafter, without regard to the culpability of the actor in producing the action.

This apparent irrelevance of blameworthiness to cause in fact is justified when the focus of analysis is on "but for" causation. That is, the manufacturer's blameworthiness will indeed be irrelevant to causation if it is shown that the plaintiff's injuries would have occurred in any event even if the product had not been defective. For example, suppose the driver of an automobile with defective brakes falls asleep at the wheel and is injured when his car hits a tree. Assuming the manufacturer's blameworthiness involved its failure to adequately test the car's brakes, there would be no "but for" causal relation between the defect, or the misconduct, and the injury. The injury would have occurred anyway, even if the brakes had been in perfect condition. In cases such as this, where the "but for" test of causation definitely exculpates the manufacturer, it should prevail regardless of the extent of its culpability in marketing the product in a defective condition.

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[52]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 41, 42, at 236, 244 (4th ed. 1971).

[53]Sabich v. Outboard Marine Corp., 60 Cal. App. 3d 591, 131 Cal. Rptr. 703, 706 (Cal. Ct. App. 1976). *See also* Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1975):

> With but a few recently developed and very limited exceptions, . . . the rule has been: no matter how tortious the defendant's conduct may have been and no matter how long or how strongly a given loss has been considered compensable, unless the plaintiff is able to persuade the fact finder by a preponderance of the evidence that the defendant's activity was at least *one* of the infinite 'but for' causes of his losses, the plaintiff cannot recover.

Id. at 163 (footnote omitted) (emphasis in original).

At least in products liability cases, however, cause in fact questions are usually of a different type. The more typical factual causation issue in this context is one of proof: is the circumstantial evidence of how the accident happened adequate to support the inferences that a defect existed in the product and that it was a substantial factor in producing the misadventure? This is a very different issue from "but for" causation; it is a question of *degree* of the certainty of proof, of the *likelihood* that a product defect was an appreciable factor in producing the accident. This is in fact the primary form of proof of causation available in a good number of products cases, particularly where the plaintiff is killed in the accident, and where the evidence on causation is circumstantial and admits of alternative explanations of how the accident occurred. A workable rule applied to this type of cause in fact problem in some torts cases outside of the products liability area is that to prevail, the plaintiff must only show that the defendant's conduct substantially increased the risk of the type of harm he suffered.[54] This concept of causation is sometimes called a "causal linkage."[55]

By its terms the causal linkage test is very flexible since the standard of "substantial increase in risk" is subject to varying interpretations. In cases involving the sale of defective products in flagrant disregard of the public safety, the test probably should be altered to whether *the defect or the manufacturer's misconduct* substantially increased the risk of the type of injury suffered by the plaintiff. When the causal linkage issue is close, and the manufacturer's behavior in marketing the defective product flagrantly improper, it is submitted that the determination of "substantial increase in risk" should be made against the manufacturer. This is appropriate because the normal balance of fairness between the plaintiff, normally carrying the burden of proof on causation, and the defendant, usually innocent or at worst inadvertent, is altered when the defendant has deliberately or recklessly exposed the plaintiff to a substantial risk of harm.

So, to change the facts of the previous hypothetical somewhat, assume that the plaintiff's decedent is found dead behind the wheel of his automobile that crashed into a tree. Suppose further that the evidence on the cause of the accident supports inferences of approx-

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[54]*See, e.g.*, Haft v. Lone Palm Hotel, 91 Cal. Rptr. 745, 478 P.2d 465 (1970); Reynolds v. Texas & Pac. Ry., 37 La. Ann. 694 (1885). *See generally* 2 HARPER & JAMES, *supra* note 33, § 28.7, at 1548.

[55]*See* Haft v. Lone Palm Hotel, 91 Cal. Rptr. 745, 755, 478 P.2d 465, 475 (1970); Calabresi, *supra* note 51, at 71-72. "In sum, the concept of causal linkage between acts and activities and injuries is no more than an expression of empirically based belief that the act or activity in question will, if repeated in the future, increase the likelihood that the injury under consideration will also occur." *Id.* at 72.

imately equal plausibility that the decedent either fell asleep at the wheel or was awake but unable to avert the accident because of defective brakes. If the manufacturer had failed to test the brakes adequately, and this failure is shown to have been reckless, in flagrant disregard of the risk to the public, the plaintiff can fairly be permitted to prevail on the causation issue. This should be true even though from the traditional perspective he is unable to meet his burden of proof (by a preponderance of the evidence) on this point. There are two reasons for this conclusion: (1) the manufacturer's misconduct substantially increased the risk of the type of accident that killed the decedent, and (2) the decedent was subjected to this risk only because of the manufacturer's grossly irresponsible behavior. This result effectively shifts the burden of proof on causation to the highly blameworthy manufacturer, an approach that has been used in certain other tort contexts where the usual burden of proof rules operate as harsh and insuperable obstacles to recovery and where they fairly may be altered in the plaintiff's favor.[56]

Thus, questions of causal linkage, rather than directly concerning metaphysical cause and effect, primarily involve questions of fairness to the parties concerning the *degree of proof* required to establish metaphysical causation. "The tendency to temper rules to fit moral conduct . . . in the field of certainty of proof" has been recognized on the damages side of tort law for some time.[57] Courts also have tended to administer the rules of causation "in such a manner as to be most severe upon the intentional wrongdoer and more severe upon the reckless wrongdoer than upon the negligent wrongdoer."[58] Thus, the manufacturer's blameworthiness may properly bear on the resolution of the cause in fact issue in certain products liability cases.

Drayton v. Jiffee Chemical Corp.,[59] while not expressly addressing the relation of blameworthiness to factual causation, is illustrative of how it may operate. The infant plaintiff sued the manufacturer of a drain cleaner called "liquid-plumr" for severe

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[56]*See, e.g.*, Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (burden of proof on identity of manufacturer of destroyed blasting cap that injured plaintiff shifted to multiple defendant manufacturers); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (burden of proof on identity of person responsible for plaintiff's traumatic injury while anesthetized for surgery shifted to multiple medical defendants); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (burden of proof on identity of hunter whose shot injured plaintiff shifted to defendants who simultaneously shot in plaintiff's direction).

[57]*See* Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 592 (1933).

[58]*Id.* at 588 (footnote omitted).

[59]395 F. Supp. 1081 (N.D. Ohio 1975).

burns suffered when a bottle of drain cleaner tipped over and doused her with the contents. The bottle was discarded after the accident,[60] and the manufacturer argued that its product had been mistaken for a competitor's drain cleaner called "Mister Plumber" which it claimed was more likely to have been the product that caused the plaintiff's injuries. Thus, the cause in fact question concerned the identity of the product.[61] Apart from the landlady's testimony that she had purchased a bottle of "liquid-plumr" more than a year before the accident, and the recollection of the plaintiff's parents, it appeared far more likely that the injury-producing product had indeed been "Mister Plumber" rather than the defendant's "liquid-plumr." Indeed, the father testified that after pouring some of the drain cleaner into the sink he covered it with a towel, just before the accident, and that he "dabbed" rather than "flushed" or "flooded" the child's face thereafter, actions much more consistent with the instructions on the competitor's label than on the defendant's.[62] Moreover, the extreme causticity of the product may have been more consistent with the chemical composition of the competitor's product.[63] Despite this strong objective evidence of product misidentity, the court nevertheless accepted the weaker testimonial identity evidence of the landlady and parents.[64]

The cause in fact issue was central in *Drayton;* either "liquid-plumr" had been the cause of the injuries, or it had not. Circumstantial evidence of causation or identity was all that was available, and the question could clearly be decided either way. It may be that what tipped the scales in the plaintiff's favor on this issue was evidence that the "defendant's conduct in designing and marketing liquid-plumr was . . . perhaps even reckless . . . ."[65] Although the blameworthiness issue was not fully developed in the reported opinion, this case illustrates the type of close cause in fact situation in which a manufacturer's culpability may influence the causation issue.

Another common cause in fact problem in products liability cases concerns the question of whether the plaintiff *relied* on the defendant's allegedly inadequate warnings or misleading

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[60]*Id.* at 1086.

[61]See note 56 *supra* noting examples of tort cases in other contexts where the plaintiff was relieved of his normal obligation to establish the identity of the defendant.

[62]395 F. Supp. at 1086-87. Nor had the father had any prior experience with other drain cleaners. *Id.* at 1087.

[63]*Id.* at 1087.

[64]*Id. See also* Drayton v. Jiffee Chemical Corp., 413 F. Supp. 834, 835-36 (N.D. Ohio 1976).

[65]395 F. Supp. at 1097.

statements.[66] If the plaintiff cannot demonstrate that the manufacturer's misrepresentation caused him to alter his conduct in a manner leading to his injury, or if he cannot establish that he would have read and acted upon an adequate warning so as to avert injury, then the plaintiff would not appear to be able to connect his injury to a breach of duty by the manufacturer. Such a failure to prevail on the cause in fact issue would seem to be fatal to the plaintiff's case.

But the plaintiff's failure personally to see or otherwise learn of the inadequate warning or misrepresentation should not necessarily be fatal to his case.[67] If he can establish that someone else's actions were affected by the inadequate or false information in a manner leading to the plaintiff's injury, he has established a causal connection.[68] For example, a doctor's reliance on drug literature may be imputed to his patient who is injured by the drug.[69]

Attributing reliance in this manner from a third person to the plaintiff should be liberally allowed in cases of flagrant marketing misbehavior by manufacturers. Thus, in the MER/29 situation discussed above,[70] the FDA's reliance on the company's manipulated animal test results should have inured to the benefit of every consumer injured by the defective drug since the FDA was acting on behalf of all consumers and since the company's misrepresentations made to that agency substantially increased the risk that the drug would be approved and that users would develop cataracts. Strangely, in *Roginsky v. Richardson-Merrell, Inc.*, Judge Friendly did not agree: "If we were forced to decide, we would say that a plaintiff does not make out a case of fraud simply by showing that if the facts had been fully stated, the FDA might not have released the drug."[71] If in fact the probability that the FDA would release the drug without further testing was increased in any material degree

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[66]*See generally* Phillips, *Product Misrepresentation and the Doctrine of Causation*, 2 HOFSTRA L. REV. 561 (1974).

[67]Some courts appropriately allow a presumption that the plaintiff would have read and heeded an adequate warning. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1281-82 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 974 (Ind. 1976). *Cf.* Hamilton v. Hardy, 549 P.2d 1099, 1109 (Colo. Ct. App. 1976).

[68]*See* RESTATEMENT (SECOND) OF TORTS § 402B, Comment j (1965). *See generally* 2 HARPER & JAMES, *supra* note 33, § 28.7, at 1548.

[69]*See, e.g.*, Wechsler v. Hoffman-La Roche, Inc., 198 Misc. 540, 99 N.Y.S.2d 588 (Sup. Ct. 1950); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 702, 60 Cal. Rptr. 398, 411 (1967). *Cf.* Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 1079, 91 Cal. Rptr. 319, 330 (1970).

[70]See text accompanying notes 20-21 *supra*.

[71]378 F.2d 832, 837 (2d Cir. 1967) (footnote omitted).

on account of the fraud,[72] then Judge Friendly's conclusion was quite clearly too restrictive. Even had Richardson-Merrell not been highly blameworthy, the plaintiff's causal link nonetheless would have been clearly established; the company's flagrant misbehavior should have eliminated any lingering doubts on this issue.

Since the Food and Drug Administration acts on behalf of the public, its reliance, like a doctor's, is plainly imputable to injured members of the public. But a nonrelying plaintiff may be able to establish a causal link, albeit a weaker one, even in cases where the third parties who did rely on the inadequate or false information were *not* acting on his behalf. For example, suppose a manufacturer markets a product with fraudulent claims of its safety or with grossly inadequate warnings in view of a known and serious hidden danger. Even if the injured plaintiff never learns of the fraudulent claims nor reads the label or product literature containing the warning, someone else may and thereby causally link the misconduct or the defect to the plaintiff's injury. One may assume that manufacturers culpably market products in this manner in order to improve the marketability of the product at a particular price.[73] If consumers were to know of the actual danger hidden in the product and wrongfully concealed from them by the manufacturer, many might be unwilling to purchase it at the same price or even at all.[74] Economic constraints might well then force the manufacturer either to cure the defect or, if that were not possible, perhaps to take it off the market altogether. In this way, a manufacturer's communication of false or inadequate information to consumers *in general* can be seen to increase the risk of harm to *all* consumers of the product, including those who individually neither knew of the misrepresentation nor read the inadequate warning. Even these consumers then, can establish a causal link between the manufacturer's informational malfeasance and injuries generated by the danger that was intentionally or recklessly concealed. The reliance of some, it might be said, fairly may be imputed to all.[75]

Since this type of causal link argument regarding safety information failures is concededly somewhat novel, some courts may reject it in cases of innocent or merely inadvertent conduct. Yet when the manufacturer deceitfully or recklessly misleads the public concern-

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[72]This appears to have been the case. *See* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 696, 60 Cal. Rptr. 398, 405 (1967).

[73]*See* Owen, *Punitive Damages*, *supra* note 9, at 1294-95.

[74]*See* Larsen v. General Motors Corp., 391 F.2d 495, 505-06 (8th Cir. 1968); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 87 (4th Cir. 1962) ("had the warning been in a form calculated . . . to convey a conception of the true nature of the danger, this mother . . . might not have purchased the product at all").

[75]*See* Owen, *Punitive Damages*, *supra* note 9, at 1348-49 n.443.

ing the safety of a product, the imputation of reliance from consumers generally to those injured by the concealed danger appears eminently sound in both logic and justice. This should be equally true whether the misconduct involved supplying false assurances of product safety or failing to supply adequate warnings of danger. Thus, the cause in fact issue may appropriately be affected by the aggravated blameworthiness of the manufacturer in some types of products liability cases.

B. Proximate Cause

Proximate causation usually involves questions quite different from factual causation, although the two sometimes overlap. The establishment of some type of cause in fact linkage is in most cases an analytical prerequisite to an intelligent consideration of the proximate or legal cause issue.[76] Thus, the proximate cause issue generally assumes that the plaintiff's injury was in fact caused by the defendant's conduct or product defect, and involves the further question of whether the defendant for some other reason of policy or fairness should nonetheless be shielded from responsibility for the harm.[77] Perhaps the most unifying rationale for the variety of applications of the proximate cause doctrine is to avoid imposing on the defendant a crushing liability totally out of proportion to his degree of fault.[78] And so the rules of proximate cause are at least partially "geared to fault and will reflect the policy of making the extent of liability reflect the degree of fault or the factors which made conduct blameworthy."[79]

This aspect of the proximate cause rules in accident law has long been recognized[80] and was given explicit recognition in section 501(2) of the *Restatement (Second) of Torts:*

> The fact that the actor's misconduct is in reckless disregard of another's safety rather than merely negligent is a matter to be taken into account in determining whether a jury may reasonably find that the actor's conduct bears a sufficient

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[76]*See generally* W. PROSSER, *supra* note 52, § 42, at 249-50; Calabresi, *supra* note 51, at 72.

[77]Noting that "[p]roximate cause cannot be reduced to absolute rules," Prosser quotes 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906) as an accurate summary of the role of proximate cause: "It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." *See* W. PROSSER, *supra* note 52, § 42, at 249.

[78]*See, e.g.*, 2 HARPER & JAMES, *supra* note 33, § 20.4, at 1132.

[79]*Id.* at 1133.

[80]*See, e.g.*, Bauer, *supra* note 57, at 589.

> causal relation to another's harm to make the actor liable therefor.[81]

Rules of proximate cause, then, are to be "stretched" in cases of reckless misconduct. The rationale is clear: the application of rules designed to prevent liability from becoming unfairly disproportionate to the defendant's fault should adjust to situations in which the defendant is in fact seriously at fault.

There is no good reason why this principle relaxing the normal proximate cause rules should not apply to cases of flagrant misbehavior of manufacturers marketing defective products. In fact, there are at least two reasons why the principle is even better suited to the products liability context than to other accident situations. First, although one reason sometimes given for the principle is to deter similar misbehavior in the future,[82] liability insurance often frustrates this objective.[83] Yet, while liability for many kinds of accidents is generally insured, manufacturers often self-insure against products liability losses. Moreover, insurance premiums for most insured manufacturers are "loss-rated" so that the price is calculated primarily on the manufacturer's past products liability loss experience.[84] Second, a general criticism of the principle's deterrence rationale, that "most torts are unintentional or are committed in disregard or ignorance of legal consequences,"[85] is less applicable to the present context than to the typical accident situation. While a manufacturer's decision to market a product in flagrant disregard of a danger to consumers is certainly not an intentional tort in the same way as a punch in the nose, it is nevertheless deliberate and planned. Accordingly, manufacturers at least have an opportunity to consider the potential legal consequences flowing from their conduct. Indeed, while individual tortfeasors may not usually contemplate the legal consequences of their actions in most tort contexts, manufacturers often do receive legal counsel prior to acting. Thus, rules of proximate cause may fairly be stretched in cases of flagrant marketing misconduct by manufacturers.

Most courts for example have held that the normal proximate cause rules limiting liability to the foreseeable consequences of an action operate in the products liability area as in tort law generally.[86] Liability should probably be barred, therefore, if the

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[81] RESTATEMENT (SECOND) OF TORTS § 501(2) (1965).

[82] *See* 2 HARPER & JAMES, *supra* note 33, § 20.6, at 1152-53.

[83] *See id.* at 1133.

[84] *See* Owen, *Punitive Damages*, *supra* note 9, at 1309 n.252 and accompanying text.

[85] 2 HARPER & JAMES, *supra* note 33, § 20.6, at 1152 (footnote omitted).

[86] *See generally* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 11.02 (1976). However, liability in strict tort under the cost-benefit theory may arise without regard

plaintiff is injured by slipping on the vomit of a person who has suffered an allergic reaction to the defendant's drug which carried inadequate warnings of such reactions.[87] However, if the drug manufacturer knew of frequent cases of similar allergic reactions but failed to warn about them to avoid losing sales, the scope of liability flowing from such reactions could appropriately be broadened to include the plaintiff's injuries in the case hypothesized.

The relaxation of the normal proximate cause rules in cases of reckless misconduct applies equally well in intervening cause cases. Suppose the plaintiff is injured by the explosion of a cylinder overpressurized by his employer with compressed air. Suppose further that, although the cylinder had contained a gas refrigerant when purchased by the employer from defendant, and bore a label indicating that refilling the cylinder was not only dangerous but contrary to law, the employer had nevertheless recharged it with pressurized air.[88] If the seller of gas refrigerant had no reason to know that its warning was being ignored and that cylinders were being refilled in a dangerous manner, it should not be liable for failing to add a safety release valve to prevent overpressurization by third parties acting contrary to law and to the warnings on the cylinder. In this situation, the intervening action of the employer should probably break the causal chain of events. But suppose the seller knew that persons frequently were being injured severely by explosions caused by such rechargings despite the warnings, and that installation of a simple and inexpensive safety device on the cylinders would eliminate the danger. Under these circumstances, the failure to add such a device might well be sufficiently blameworthy to expand the scope of liability to include resulting injuries regardless of the culpability of the employer's intervening conduct.[89] The rules of proximate cause thus may properly be stretched, and

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to the foreseeability of the injuries, *see* text accompanying note 41, and a few courts have so intimated. *Cf.* Phillips v. Kimwood Mach. Co., 269 Or. 485, 491-94, 525 P.2d 1033, 1037-39 (1974); Berkebile v. Brantly Helicopter Corp., 219 Pa. 479, 485, 337 A.2d 893, 900 (1975); Helicoid Gage Div. of Amer. Chain & Cable Co. v. Howell, 511 S.W.2d 573, 575 (Tex. Ct. Civ. App. 1974).

[87]*Cf.* Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 156 S.E.2d 208 (1967) (unwholesome food).

[88]*Cf.* Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

[89]It should be noted in this situation, as in many others raising the issue of proximate causation, that the normal rules of proximate cause may be sufficiently flexible to expand the scope of liability to include injuries attributable to negligent or reckless misconduct even without a special rule so providing. The flagrancy of a defendant's misconduct often reflects, among other factors, his *awareness* of a particular danger. *See* Owen, *Punitive Damages*, *supra* note 9, at 1361-71. And dangers known are obviously "foreseeable" which is of course how the scope of responsibility is defined in many proximate cause contexts.

the scope of a manufacturer's duty accordingly increased, in products liability cases of reckless manufacturer misconduct.

V. Defenses Based on Plaintiff's Conduct

Four different defense doctrines based on the plaintiff's conduct—contributory negligence, comparative negligence, assumption of risk, and product misuse—may be available in a products liability case, depending upon the jurisdiction and the plaintiff's theory of liability. The aggravated blameworthiness of the manufacturer in marketing a defective product may play a significant role with respect to each of these defenses.

A. Contributory Negligence

Of all the rules of liability and defense, the contributory negligence defense is most clearly affected by the reckless nature of a defendant's conduct: "A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety."[90] The rule logically applies to products liability cases.[91] So, if a plaintiff is injured in a crash caused by the blowout of a tire having an obvious defect that he carelessly failed to discover, his negligent failure to inspect the tire will not bar a negligence or warranty[92] action if the manufacturer is shown to have marketed the tire in reckless disregard of consumer safety. Moreover, even the plaintiff's negligent decision to drive on the tire after discovering the defect and realizing the danger will not bar his recovery on contributory negligence grounds.[93] It is difficult to argue against this rule since the responsibility for an injury caused by a highly blameworthy defendant can much more fairly be

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[90]Restatement (Second) of Torts § 503(1) (1965). A duplication of the rule is found in section 482(1) of the *Restatement*. *See generally* W. Prosser, *supra* note 52, § 65, at 426; 2 Harper & James, *supra* note 33, § 22.6, at 1213.

[91]*See* Ussery v. Federal Laboratories, Inc., [1973-75 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 7084, at 12,470, 12,479 n.4 (4th Cir. 1973) (Winter, C.J., dissenting) (opinion withdrawn by order filed March 31, 1975).

[92]In a minority of states, contributory negligence will defeat a warranty claim. *E.g.*, Coleman v. American Universal of Florida, Inc., 264 So. 2d 451 (Fla. App. 1972); Devaney v. Sarno, 122 N.J. Super. 99, 299 A.2d 95, *rev'd on other grounds*, 125 N.J. Super. 414, 311 A.2d 208 (1973) (failure to wear seatbelt). *See generally* 2 L. Frumer & M. Friedman, Products Liability § 16.01[3] (1976). Of course "simple" contributory negligence is held not to be a defense to strict liability in tort in most states. *See, e.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Restatement (Second) of Torts § 402A, Comment n (1965).

[93]*See* Restatement (Second) of Torts § 503, Comment b (1965): "[H]e is not barred from recovery merely by a failure to exercise reasonable care . . . after he knows of the defendant's reckless misconduct and realizes the danger."

placed on him, the principal causative agent, than on the injured plaintiff who was at worst somewhat careless concerning his own safety. However, if the injured plaintiff was reckless with regard to his own safety, as by driving at high speeds on a tire discovered to be seriously defective, he will be barred from recovery against even a reckless manufacturer whether the action is brought in negligence,[94] warranty,[95] or perhaps even strict liability in tort.[96]

B. Comparative Negligence

While the application of the comparative negligence doctrine to products liability litigation involves too many complex and unresolved problems to examine fully here,[97] a few observations may be made on the effect a manufacturer's aggravated blameworthiness should have on the doctrine in general. Abandoning the "all-or-nothing" approach of the contributory negligence defense, comparative negligence instead apportions damages between the parties on the basis of their respective fault.[98] Consequently, if a manufacturer is shown to have been flagrantly at fault, it initially would appear appropriate simply to balance this off against the plaintiff's contributory fault in apportioning damages.

Yet this conclusion conflicts with the traditional contributory negligence rule discussed above that allows a negligent plaintiff *full* recovery for injuries caused by a *reckless* defendant. How is this impasse to be resolved? One solution would be to attempt to advance the punitive, deterrent, and compensatory purposes underlying the full recovery rule to the utmost by requiring the reckless defendant to pay for all the plaintiff's damages. But this full recovery approach

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[94]*See, e.g.*, 2 HARPER & JAMES, *supra* note 33, § 22.6, at 1214; W. PROSSER, *supra* note 52, at 426; RESTATEMENT (SECOND) OF TORTS §§ 482(2), 503(3) (1965).

[95]Even in those states that do not recognize the contributory negligence defense in warranty cases, see note 92 *supra*, a court might bar recovery on the basis of the plaintiff's reckless disregard for his own safety. In a case involving this type of aggravated consumer misconduct, the court might find that the defect was not a proximate cause of the injury. *See* U.C.C. §§ 2-314, Comment 13, 2-316(3)(b) & Comment 8, 2-715(2)(b) & Comment 5.

[96]The conduct may amount to an unreasonable or reckless assumption of the risk and an action may be barred on that account. *See* text accompanying notes 104-16 *infra*. Even in such a situation, however, a rule of comparative misconduct would probably best accommodate the interests of the parties in most cases. *See* text accompanying note 116 *infra*.

[97]On the role of comparative negligence in strict tort cases, *see* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 299, 319-335 (1977).

[98]*See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

looks almost exclusively to the interests of the plaintiff,[99] whereas the comparative negligence doctrine generally has been adopted to reach a fair accommodation of interests between plaintiffs and defendants. Since contributorily negligent plaintiffs are to some extent both causally and morally responsible for their injuries, it would appear fair to require them to absorb the relatively small proportion of their damages logically attributable more to their own negligent misbehavior than to the defendant's reckless misconduct.[100]

It may be that special considerations in some products liability situations will dictate the reconsideration of the damages apportionment principle as Professor Twerski has suggested.[101] Perhaps, indeed, the reckless manufacturer should be punished by being required to pay for the damages otherwise more appropriately allocated to the injured plaintiff. Yet punishment is probably more satisfactorily administered through assessments of punitive damages[102] than by relieving the injured party of his fair share of the burden of the actual damages.[103] Thus, in the application of the comparative negligence rules, the recklessness of a manufacturer's misconduct ordinarily should affect only the apportionment of damages.

C. Assumption of Risk

While it has been subjected to less abuse than has the contributory negligence defense, assumption of risk has been battered around quite a bit by courts[104] and commentators,[105] in tort law

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[99]*See id.* at 108.

[100]Moreover, the application of a rule of comparative fault would obviate, at least for this purpose, the need to determine whether the defendant's conduct was "flagrant" or "reckless."

[101]*Cf.* Twerski, *The Use and Abuse*, *supra* note 97; Twerski, *From Defect to Cause*, *supra* note 97.

[102]*See generally* Owen, *Punitive Damages*, *supra* note 9.

[103]Theoretically an award of punitive damages to the plaintiff could result in a "wash" with the compensatory damages allocated against him for his proportionate fault. The two amounts, however, would properly be identical only on rare occasions. Nevertheless, in cases of marginally reckless misconduct by the defendant, this type of wash approach—one that would fully compensate the plaintiff without substantially punishing the defendant—might often appeal to the jury.

[104]*E.g.*, Hale v. O'Neill, 492 P.2d 101 (Alaska 1971); Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977); Roseman v. City of Estherville, 199 N.W.2d 125 (Iowa 1972); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971); Farley v. MM Cattle Co., 529 S.W.2d 751 (Tex. 1975); Rosas v. Buddies Food Stores, 518 S.W.2d 534 (Tex. 1975).

[105]*See, e.g.*, 2 HARPER & JAMES, *supra* note 33, § 21.8; James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); James, *Assumption of Risk*, 61 YALE L.J. 141 (1952). *See generally* RESTATEMENT (SECOND) OF TORTS § 893, at 70-87 (Tent. Draft No. 9, 1963).

generally and products liability law in particular.[106] Traditionally, however, and still in the vast majority of states in most situations, a plaintiff's knowing and voluntary assumption of the risk is a complete bar to his recovery, even when the defendant has acted recklessly: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[107] In some situations more than others, it is particularly harsh to bar a plaintiff from all recovery because of his reasonable decision to encounter a risk created by the defendant's misconduct. As a result, some courts and legislatures have abolished the rule either altogether[108] or in situations in which one party occupies a powerful position of control over the welfare of the plaintiff.[109]

Manufacturers, with near-monopolistic control over vital information concerning product hazards and danger control, have such a grip on the welfare of consumers.[110] Partly as a response to this phenomenon, most courts have narrowed the availability of the assumption of risk defense in strict tort products liability actions by limiting the defense to cases of *negligent* assumptions of risk: "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds *unreasonably* to make use of the product and is injured by it, he is barred from recovery."[111]

This limitation on the assumption of risk defense may or may not adequately accommodate the interests of producers and consumers in a typical products liability case[112] involving innocent or perhaps even negligent misconduct by the manufacturer. But the

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[106]Two excellent articles on the topic are Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974).

[107]RESTATEMENT (SECOND) OF TORTS § 496A (1965). Section 503(4) mirrors the rule except that it is limited to the defendant's reckless misconduct.

[108]*See, e.g.*, cases cited in note 104 *supra*.

[109]As, for example, employers and landlords. *See* RESTATEMENT (SECOND) OF TORTS § 496A, Comment e (1965).

[110]*See* Owen, *Punitive Damages*, *supra* note 9, at 1258, 1272 n.69, 1365 n.507. *Cf.* Raymond v. Eli Lilly & Co., 371 A.2d 170 (N.H. 1977) (Kenison, C.J.).

[111]RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965) (emphasis added). *See, e.g.*, Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972) (making an *Erie* guess on Texas law); Devaney v. Sarno, 125 N.J. Super. 414, 311 A.2d 208 (App. Div. 1973), *aff'd* 65 N.J. 235, 323 A.2d 449 (1974); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976). *But see* Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974) (repudiating Fifth Circuit's *Erie* guess, holding that the plaintiff's unreasonableness in encountering the risk is not always an element of the assumption of risk defense in strict tort).

[112]The appropriateness of the rule will of course vary depending on the particular situation. *See generally* Twerski, *supra* note 106.

rule is quite clearly ill-suited to cases in which the risk assumed by the plaintiff was created by the manufacturer in flagrant disregard of the danger to consumers. Even in the general tort situation, it has been seen that conduct strikingly similar to negligent assumption of risk will not bar a plaintiff's recovery against a reckless defendant. As discussed above, the plaintiff who is injured when he unreasonably continues to drive on a tire discovered to be defective may not, on contributory negligence grounds, be barred from recovery against the manufacturer who marketed the product in reckless disregard of the risk to consumers.[113] Because of the manufacturer's powerful position of control over product safety, this is surely the proper result, whatever may be the plaintiff's theory of recovery and whatever the name of the asserted defense.

Is the answer then to abolish *all* forms of assumption of risk in products liability cases in which the plaintiff's injury is attributable to some reckless misconduct by the manufacturer? While such a solution does have some merit, it also has some drawbacks. Punishment and deterrence, as has been discussed,[114] are probably better accomplished in other ways, and even the reckless manufacturer has a legitimate interest in avoiding liability for at least some injuries attributable to the knowing misuse of its products. If an all-or-nothing assumption of risk rule of some sort is to be retained in these cases, it should probably be limited to cases in which the consumer *recklessly* assumes the risk of injury.[115] In the defective tire hypothetical, for example, perhaps the plaintiff should be barred from recovery if he drove *at high speeds* on the tire he knew to be seriously defective.

Cases such as this have a strong flavor of superseding causation, and it may be appropriate in some such instances to shield even the reckless manufacturer from liability altogether. Yet clearly the more palatable approach would be to apportion the damages in such cases according to the respective fault of the two reckless parties according to the rules of comparative negligence.[116] Assumption of risk could thereby be abolished as a complete defense at least to flagrantly blameworthy misconduct by manufacturers. At a minimum, however, a court in such cases would do well to limit the defense to instances of reckless assumption of risk, as discussed above.

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[113]*See* note 93 *supra* and accompanying text.

[114]*See* text accompanying notes 102-03 *supra*.

[115]*Cf.* Worth v. Dunn, 98 Conn. 51, 61, 118 A. 467, 471 (1922) ("reckless and unnecessary exposure to risk of injury").

[116]*See generally* Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977) (merging assumption of risk into comparative fault); V. SCHWARTZ, COMPARATIVE NEGLIGENCE 111, 165-75 (1964).

D. Product Misuse

The "misuse" or abnormal use of a product will serve under some circumstances to defeat an action by a person injured by a product claimed to have been defective. While some courts treat abnormal use as an affirmative defense,[117] and other courts consider normal use as part of the plaintiff's prima facie case,[118] most courts agree that product misuse will bar recovery in some situations.[119] So, a person injured in an automobile crash caused by tire failure may be barred from recovery if the failure is partially attributable to substantial overinflation of the tire contrary to the manufacturer's instructions.[120] Misuse is a bar to recovery in cases like this because "the result is not within the risk, or, as many courts state the matter, the result is not proximately caused by the defendant's conduct."[121] Since the rationale for this "defense" is thus usually based upon proximate causation, the predominant "test" or definition of the rule that has evolved is one of foreseeability: "[T]he manufacturer is not liable for injuries resulting from abnormal or unintended use of his product, *if* such use was not reasonably foreseeable."[122]

Earlier it was determined that the normal rules of proximate cause should be "stretched" in cases of flagrant marketing misbehavior.[123] Since the misuse "defense" is generally only a special application of the proximate cause doctrine, it seems clear that it should be affected in a similar manner by similar manufacturer misbehavior. Thus, in the overinflated tire case, suppose the manufacturer knew that overinflation would weaken its tires, that consumers were frequently overinflating them in an effort to prolong the life of the tread, and that tire failures causing serious injuries often occurred as a result. The failure to take effective steps to warn of the danger of overinflation under these circumstances might reasonably be considered reckless misconduct,[124] and the scope of responsibility could then appropriately be expanded to include

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[117]*E.g.*, McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[118]*E.g.*, Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, h (1965).

[119]*See generally* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 15 (1976); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 95-105 (1972).

[120]*Cf.* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 288-89 (5th Cir. 1975); McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

[121]Noel, *supra* note 119, at 95.

[122]1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 15, at 404 (1976) (emphasis in original).

[123]See text accompanying notes 76-89 *supra*.

[124]*See generally* Owen, *Punitive Damages*, *supra* note 9, at 1345-52.

many injuries resulting from this type of misuse. Normally a tire manufacturer might "reasonably" foresee overinflation of a limited amount, perhaps up to six or eight pounds or so. It would appear both fair and logical to expand the "reasonable foreseeability" of a highly blameworthy tire manufacturer to include instances of much greater overinflation, such as ten or twelve pounds over the recommended pressure, or perhaps even more.[125]

The rationale, of course, for "stretching" the reasonable foreseeability test of the product misuse defense in cases of reckless manufacturer misconduct is naturally similar to the justification for expanding the rules of proximate cause in similar circumstances. In both instances the rules at least in part seek to protect defendants from liability burdens greatly disproportionate to their actual fault. Thus, if a manufacturer is shown to have actually been at fault, and *flagrantly* so, the misuse defense should be adapted to reflect this fact. Perhaps the use of a comparative fault or causation rule might be the fairest and least confusing way to accomplish this result in some misuse cases.[126] Apart from this approach, however, the "reasonably foreseeable" test of the misuse defense should generally be "stretched" in products liability cases involving flagrant manufacturer misbehavior.

VI. Conclusion

Manufacturers who market defective products that injure consumers are required under strict products liability principles to pay for the resulting injuries without regard to their blame in marketing such products. Occasionally a manufacturer's conduct in placing or leaving a product on the market in a particular condition is for one reason or another highly blameworthy. In cases of this type, the traditional structure of the normal accident rules of liability and defense is thrown off balance. Much, perhaps most, products liability doctrine developed under the law of negligence, where the manufacturer's carelessness—often merely inadvertent—was a focal point

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[125]Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962), a negligence action for the death of an infant who ingested the defendant's furniture polish that bore inadequate warnings, was one of the first cases to replace the "intended use" defense with a test of reasonable foreseeability. " 'Intended use' is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability . . . ." *Id.* at 83. It is noteworthy that the manufacturer in this case had failed to warn adequately of the toxic nature of the polish despite its knowledge of thirty-two cases of human ingestion resulting in ten deaths. *Id.* at 88.

[126]*See* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *Cf.* text accompanying note 116 and note 96 *supra.*

from which the rules of duty, causation, and defense were generated. With the advent of strict liability in tort, readjustments have been made in some of the products liability rules, particularly in connection with the traditional defenses of contributory negligence and assumption of risk. But something was apparently lost sight of in the dust of the stampede first to demolish the bastion of privity and then to erect a new bastion for strict liability in tort. So much attention was devoted to the questions of whether and how *innocent* manufacturers should be liable for defects in their products, surely the more usual situation, that the questions of whether and how the rules should apply to *highly blameworthy* manufacturers were simply forgotten.

The purpose of this article has been to propose some readjustments that should help to restore a fair balance in the rules of liability and defense in cases of flagrant marketing misbehavior. Since the courts so far have failed to address the problem, the analysis has necessarily proceeded largely in the dark. Surely judicial experience in applying the proposed changes in the rules will be necessary to determine their usefulness in resolving products liability cases. Some of the adjustments I have advanced merely involve the application of established rules of tort law to the products liability context; others tread on less traditional ground. But each of the changes proposed is designed to strike a fair accommodation between the interests of manuacturers and those of consumers.

The scope of this article has been limited to the central issues in products liability litigation—defectiveness, causation, and the defenses based on the plaintiff's conduct. Several of the more peripheral issues, however, are ripe for exploration. The rule obtaining in many states, for example, prohibiting recoveries for wrongful death in warranty actions will probably not survive a reasoned scrutiny in the context of a highly blameworthy manufacturer.[127] It may also be that a *products liability* suit should lie against an employer, despite the normal bar to such suits in the workmen's

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[127]Recovery under the wrongful death acts, patterned after Lord Campbell's Act, usually is limited to deaths caused by "a wrongful act, neglect or default," or similar language. *See, e.g.*, D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 553 n.13 (1973). Some courts prohibit recovery for wrongful death in warranty actions on the theory that warranty liability is contractual and "strict" rather than the tortious type of wrongful behavior contemplated by the death acts. *See, e.g.*, Nectas v. General Motors Corp., 357 Mass. 546, 259 N.E.2d 234 (1970). *See generally* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 42, at 651 (1976). However, proof that a defendant acted recklessly should logically permit recovery even under a narrow construction of such an act, for reckless conduct is surely classifiable as "wrongful" or "neglectful." Nor should the fact that the underlying theory of recovery requires less proof of blameworthiness affect this conclusion. *Cf.* Owen, *Punitive Damages*, *supra* note 9, at 1268-75.

compensation laws, for removing an appropriate manufacturer-installed guard on a piece of industrial machinery in order to increase production.[128] And many other products liability rules, involv-

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[128]Such action by the employer is highly blameworthy when done to increase production if the guard is appropriate for the task to which the machine is put by the employer. If the employee in such a case were to sue the manufacturer for defective design, the manufacturer would prevail in many instances on grounds of the nondefectiveness of the machinery, or on principles of intervening causation. *See, e.g.*, Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971); Smith v. Hobart Mfg. Co., 302 F.2d 570 (3d Cir. 1962); Santiago v. Package Mach. Co., 123 Ill. App. 2d 305, 260 N.E.2d 89 (1970). *See generally* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 369-73 (1976).

Because workmen's compensation benefits are normally provided by statute to be the employee's exclusive remedy for covered injuries against the employer, 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.00 (1976), an employee in such a case would be left with only his workmen's compensation benefits which are plainly inadequate and do not even purport to provide full reparation. *See* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 126 (1976); Mitchell, *supra*, at 354-56. There are two exceptions to the exclusive remedy doctrine that may logically combine, however, to permit an employee to maintain a *products liability* action against the employer whose removal of the manufacturer's guard caused the employee to be injured: (1) an exception based on the employer's intentional injury to his employee, and (2) an exception for cases in which the employer is acting in a "dual capacity."

Considered alone, the intentional injury exception has been construed narrowly to exclude an employer's removal of guards. *See* Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976); Santiago v. Brill Monfort Co., 11 App. Div. 2d 1041, 205 N.Y.S.2d 919, *aff'd*, 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1960). *See generally* 2A A. LARSON, *supra*, at § 68; Schmidt & German, *Employer Misconduct as Affecting the Exclusiveness of Workmen's Compensation*, 18 U. PITT. L. REV. 81 (1956). The employee's argument that the exclusive remedy provision of the statute should be interpreted to allow suits in this type of case is of course weakened if the statute provides for an increase in benefits for employer misconduct. *See* 2A A. LARSON, *supra*, at §§ 69.10-.20 (1975).

The second applicable exception to the exclusive remedy principle, the "dual-capacity" doctrine, allows the employer to be sued if the injury is traceable to an activity of the employer "that confers on him obligations independent of those imposed on him as employer." 2A A. LARSON, *supra*, at § 72.80, at 14-112 (1976). A recent case has rejected the argument that an employer removing a guard to increase production is thereby acting in a "second capacity" as a *manufacturer* of the machinery reconstructed to serve his needs. Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d at 792, 354 N.E.2d at 557. *See also* Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3600 (Mar. 8, 1977); Williams v. State Corp. Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975); Needham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544 (Ind. Ct. App. 1977); Neal v. Roura Iron Works, Inc., 66 Mich. App. 273, 238 N.W.2d 837 (1975); Panagos v. North Detroit Gen. Hosp., 35 Mich. App. 554, 192 N.W.2d 542 (1971). *See generally* Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

As argued cogently in the *Rosales* dissent, however, the two exceptions merge into a compelling argument for permitting suit against an employer who reconstructs his machinery by removing guards to increase production at the obvious expense of

ing problems of privity,[129] obvious, dangers, disclaimers of liability,[130] limitations on remedies, notice, statutes of limitations, contribution and indemnity and others, may also prove to require readjustment in cases of flagrant marketing misbehavior. The time is nigh for the courts to re-examine the normal rules of liability and defense in the context of the highly blameworthy manufacturer.

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employee safety. *See* 41 Ill. App. 3d at 796, 354 N.E.2d at 561 (Simon, J., dissenting). By so altering the machinery, in flagrant disregard of the danger to employees, the employer flouts and subverts the common-law and statutory rules of product safety. Apart from the fact that such behavior deserves to be punished and ought to be deterred, an employee injured thereby surely should be afforded full compensation against the responsible party. Allowing noninsurable damage suits against the employer appears to be an effective method of accomplishing these objectives without substantially impairing the general exclusive remedy principle of the workmen's compensation laws. Moreover, punitive damages assessments might even be in order in appropriate cases of this type.

[129]It should be noted that an early exception to the privity defense was made for cases involving the sale by the manufacturer of "an article which he knows to be imminently dangerous to life or limb of another without notice of its qualities." Huset v. J.I. Case Threshing Machine Co., 120 F. 865, 871 (8th Cir. 1903). *See* Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098 (1905) (fraudulent act); Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1837), *aff'd*, 4 M. & W. 337 (1838) (fraud).

There appears to be no particular reason why this privity exception should not be extended to other nonfraudulent cases of flagrant manufacturer misbehavior as well.

[130]*Compare* RESTATEMENT (SECOND) OF TORTS § 496B (1965) ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is contrary to public policy.") *with* RESTATEMENT (SECOND) OF CONTRACTS § 337(1) (Tent. Draft No. 12, 1977) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.")

The Use and Abuse of Comparative Negligence in Products Liability

AARON D. TWERSKI*

The state of the law concerning the role of plaintiff's conduct in product liability litigation is unsettled and confused. The courts have barely become acclimated to strict liability when they were forced to encounter the comparative negligence revolution and assess its impact on the newly-emerging theory.[1] It is not an understatement to say that the results have been uneven.[2] But worse than the lack of uniformity has been the lack of incisive analysis in the judicial opinions. As could be expected, the bar has split sharply on the appropriateness of the comparative negligence defense in strict pro-

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[1]Although prior to 1969 six states had adopted comparative negligence by statute, the dramatic shift in the adoption of comparative negligence has taken place since that time. Since 1969, 26 states have shifted to comparative negligence. Several courts have embraced comparative negligence by judicial opinion. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). For a comprehensive list of the statutes adopted as of 1976 see Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976). To that compilation should now be added Pennsylvania. 17 PA. CONS. STAT. §§ 2101, 2102 (Supp. 1977). For an incisive analysis of the comparative negligence doctrine see V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

[2]The following courts have applied comparative fault in product liability cases: West v. Caterpillar Tractor Co. 547 F.2d 885 (5th Cir. 1977) (The *West* court, apparently, would not apply comparative fault when the fault is in failing to discover a defect or to guard against the possibility of its existence); Edwards v. Sears & Roebuck, 512 F.2d 276, 290 (5th Cir. 1975); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D.N.H. 1972); Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976), modifying the court's earlier decision in the same case reported at 543 P.2d 209 (Alas. 1975); West v. Caterpillar Tractor Co. 336 So. 2d 80 (Fla. 1976); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). *Contra*, Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976) (holding that applying Nebraska slight-gross comparison statute, NEB.

ducts liability.[3] It will be argued in the ensuing pages that the excesses of either extreme should be avoided. Comparative negligence should *not* be applied across the board in product liability cases. To do so would significantly reduce the responsibility which has been justifiably placed on the manufacturing community.[4] On the other hand, it is just not true that the structure of product liability law precludes the application of comparative negligence in all circumstances. In those cases where the plaintiff has breached his responsibility for maintenance, care, and use of a product outside of certain well-defined parameters, serious consideration should be given to the reduction of plaintiff's recovery as a matter of fairness to the defendant. Indeed, it will be suggested that the issue of comparative negligence *vel non* should not depend on whether the theory of recovery is negligence or strict liability, but rather should depend on the type of product defect being litigated and the nature of the contributory fault under consideration. After examining the role of comparative negligence in relation to plaintiff behavior, either as contributory negligence or assumption of the risk, this Article will probe the use of comparative negligence as a means of avoiding exceedingly difficult cause in fact and/or proximate cause problems. There is substantial evidence that comparative negligence will be used by courts and juries as a method of compromising causation questions which heretofore have been considered all-or-nothing issues by the law.

I. POLICY CONSIDERATIONS—AND THEN ANOTHER THREE FACTORS

The discussion of the policy factors which either support or militate against the use of contributory negligence in products liability has focused to date on the theoretical justifications for

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REV. STAT. § 25-1151 (1964), would be confusing in a strict liability case); Buccery v. General Motors Corp., 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); Hoelter v. Mohawk, 170 Conn. 495, 365 A.2d 1064 (1976) (dissent chastising majority for not applying comparative fault).

[3]Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)*, 42 INS. COUNS. J. 39 (1975); Fleming, *Forward: Comparative Negligence at Last—by Judicial Choice*, 64 CALIF. L. REV. 239, 268 (1976); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Note, *Products Liability, Comparative Negligence and the Allocation of Damages Among Multiple Defendants*, 50 S. CALIF. L. REV. 73 (1976).

[4]See text accompanying notes 45 to 49 *infra*.

strict product liability.[5] It is argued that if the purpose of strict liability is to control risk exposure at the point of design or manufacture, it then becomes inappropriate to bar recovery because of plaintiff's unreasonable conduct.[6] Furthermore, in those cases in which plaintiff's claim is based on some form of express warranty it is unfair to bar plaintiff's recovery because plaintiff was foolish enough to rely on the defendant's representations.[7] On the other hand, advocates of the affirmative defenses argue that strict liability does not stem from an attempt to redefine basic relationships between manufacturers and consumers, but rather derives from the inordinately difficult proof problems which faced a plaintiff seeking recovery in a product liability case.[8] To the extent that strict liability merely reflects a belief that in a product defect case the defendant is guilty of non-provable negligence, then there is no justification for limiting the affirmative defenses of contributory negligence and assumption of the risk.

Although the arguments which proceed from an examination of strict liability theory shed light on the appropriateness of utilizing affirmative defenses, they do not tell the whole story. There are perspectives which stem from the peculiar nature of product liability relationships which cut across doctrinal lines and which should affect our decision as to whether the plaintiff should be barred or have his recovery reduced. The following arguments should be considered without regard to whether the theory for recovery is negligence, strict liability, or express warranty.

A. Multi-risk Product Exposure v. Uni-risk Plaintiff Exposure

In evaluating the ultimate fairness of barring or reducing the plaintiff's recovery by the percentage of plaintiff's fault, the disparity between the kinds of risks created by plaintiff and defendant should be explored.[9] Products liability claims, especially design

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[5]*See* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968); Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

[6]Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

[7]Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939).

[8]Levine, *supra* note 5, at 648; Noel, *supra* note 5, at 110; Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1956).

[9]Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974); Twerski, *From Defect to Cause to*

defect and failure-to-warn cases are not one-on-one situations. In the classic encounter between a negligent defendant and a contributorily negligent plaintiff, the defendant exposes the plaintiff to a risk and the plaintiff, by his negligent conduct, exposes himself to a risk. Equitable considerations preclude a plaintiff from total recovery when the plaintiff's conduct is similar in scope and in nature to that of the defendant. However, in a product liability case based on defective design, the defendant is not facing the plaintiff one-on-one. The defendant distributes to the world at large a product which is unreasonably dangerous and one can statistically calculate that it will bring harm to a percentage of users.[10] Thus, for example, if a drill press is designed without a safety guard, there is little question that somewhere in the manufacturing community there will be a plaintiff who is destined to have his hand severed, due either to his negligence or to inadvertence.[11] One noted author has likened this to an intentional tort.[12] In essence, once a product with a design defect is marketed, we know with substantial certainty that there will be a victim—we just do not know his name. Thus, it seems to me that, whether the theory is strict liability or negligence, we should be reluctant to reduce plaintiff's recovery. The reasons are several. First, as a matter of simple fairness, the comparison between defendant's act and plaintiff's act leads to the conclusion that the defendant's act is certain to cause damage to any plaintiff who interacts with the product in the same manner as has this plaintiff.[13] It might

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Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297 (1977).

[10]R. POSNER, ECONOMIC ANALYSIS OF LAW 66 (1972) states:

> Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions. The element of intention is unmistakable when the tortfeasor is an enterprise which can predict from past experience that it will inflict a certain number of accidental injuries every year.

[11]The safety guard cases make up a substantial portion of product liability literature. *See, e.g.*, Elder v. Crawley Book Mach. Co., 441 F.2d 771 (3d Cir. 1971); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd sub nom.* Yoder Co. v. General Copper & Brass Co., 474 F.2d 1339 (3d Cir. 1973); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Meyer v. Gehl Co., 36 N.Y.2d 759, 329 N.E.2d 666, 368 N.Y.S.2d 834 (1975); Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968).

[12]*See* Posner, *supra* note 10; Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Product Liability Actions*, 10 IND. L. REV. 769 (1977). *See also* text accompanying notes 72-75 *infra*. *But see* Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 392 (1975).

[13]Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972); Schuh v. Fox River Tractor Co., 63 Wis. 2d 728, 218 N.W.2d 279 (1974), demonstrate the conflicting attitudes adopted by the courts to this problem. *Schuh* is discussed at length in Twerski,

be argued that this disparity in fault should enter into the consideration of what percentage of fault is to be attributed to the defendant and what percentage to plaintiff.[14] Yet, this is easier said than done.

A lawsuit proceeds with plaintiff and defendant in a one-on-one adversarial setting. If the plaintiff seeks to broaden the scope of the inquiry to demonstrate that the defendant's activity affects others in a negative manner, the defendant may legitimately claim that the evidence is inadmissible.[15] Even if the evidence is admissible for a limited purpose, the plaintiff is not free to paint defendant's product as faulty outside the context of the individual case.[16] It thus remains for the court, in formulating its legal doctrine, to take into account the limitations which exclude such considerations from the litigation process. If a design defect bears the potential of great public harm and the certainty of individual harm, then it behooves the court in structuring its doctrine of comparative negligence to consider this factor. The court cannot expect that all this testimony will come out in the trial process since the trial is, by definition, limited to the direct adversarial setting.

There is a second consideration which is difficult to assess, but which must be taken into account nonetheless. Whether a defendant faces great financial exposure as a result of a design defect is not easy to determine. Many design defects, because of their obvious nature, bear a substantially reduced probability of producing harm. With the decline of the patent-danger rule, it may well be that products with such obvious defects will be defined as unreasonably

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From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts, 60 MARQ. L. REV. 297, 346 (1977). In *Bexiga*, in now famous language, the court said:

> We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.
>
> The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect aganst.

60 N.J. at 412, 290 A.2d at 286.

[14]*See* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 178 (1974). To the extent that the intentional tort analogy is persuasive, then comparative fault should not be applied. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.? (1974).

[15]L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 12.01(2) (1976); Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948).

[16]*Id.*

dangerous and thus not socially desirable.[17] We will, therefore, be faced with a situation in which a manufacturer produces an unreasonably dangerous product whose harm potential in terms of numbers is small. Might it not be profitable for defendant to pay out the verdicts and to continue manufacturing the selfsame product? If we are to consider comparative negligence as a factor in a product liability case, we may be reducing the defendant's financial exposure to the point where maintaining the design defect becomes economically prudent. A similar concern has led Professor Owen to the conclusion that we should not remove punitive damages from the plaintiff's arsenal in product liability litigation when dealing with a reckless or malicious tortfeasor.[18] The argument would seem to be particularly strong when a defendant may otherwise be protected from facing the full force of compensatory damages.

B. Product Liability Law As Representational

A great debate rages as to whether product liability law is based on unreasonable risk principles which are rooted in negligence law,[19] primarily tort, or whether it is fundamentally representational. In a landmark article,[20] Professor Shapo has developed the

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[17]For all the relentless academic criticism leveled at the patent-danger rule, the rule demonstrates continued strength. *See* 2 F. HARPER & F. JAMES, LAW OF TORTS § 28.5 (1956); Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973); Twerski, *From Codling, to Bolm to Velez: Tryptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974). Nevertheless, cases continue to reflect the spirit if not the letter of the patent-danger rule. Schell v. AMF Inc., 442 F. Supp. 1123 (M.D. Pa. 1976); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 974 (Ind. 1976); Tibbets v. Ford Motor Co., 358 N.E.2d 460 (Mass. 1976); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975). The better-reasoned cases have abandoned the patent-danger rule and have opted for a total risk utility analysis. Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[18]Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1282-87 (1976); Owen, *The Highly Blameworthy Manufacturer: Implications On Rules of Liability and Defense in Product Liability Actions*, 10 IND. L. REV. 769 (1977).

[19]Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

[20]Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

thesis that the crux of product liability litigation lies in consumer disappointment in product performance.[21] Whether or not one agrees in totality with Professor Shapo's thesis, he has clearly identified a major theme that runs through the entirety of product liability law. Its implications for affirmative defenses are most important. If the line of demarcation between express warranty and implied warranty/strict liability are blurred and one shades almost imperceptibly into the other, then we must face the implication that a consumer's reaction to a product has to a great extent been taught to him by the marketing process. It ill behooves a manufacturer who has encouraged certain product behavior, through either overt or subtle marketing techniques, to raise the defense that the consumer has failed to follow societal norms for product use and has instead followed the seller's norms. It smacks of the child who murders his parents so that he can attend the orphans' picnic. As a matter of elemental fairness, the defendant should not be permitted the advantages of product representations which encourage certain kinds of plaintiff behavior which, in turn, increase sales[22] and at the same time use that behavior as a shield against full recovery when the product misfires at that level of performance. This argument is valid even if the defendant's representations fail to reach the explicit level necessary for an express warranty or misrepresentation.[23] The threshold level for express warranty and misrepresentation is fairly

[21]Professor Shapo's thesis is:

> Judgments of liability for consumer product disappointment should center initially and principally on the portrayal of the product which is made, caused to be made or permitted by the seller. This portrayal should be viewed in the context of the impression reasonably received by the consumer from representations or other communications made to him about the product by various means: through advertising, by the appearance of the product, and by the other ways in which the product projects an image on the mind of the consumer, including impressions created by widespread social agreement about the product's function. This judgment should take into consideration the result objectively determinable to have been sought by the seller, and the seller's apparent motivation in making or permitting the representation or communication.
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> These determinations of liability should consider, generally, the integrated image of the product against the background of the public communications that relate to it; and should refer, specifically, to those communications concerning the characteristics or features of the product principally related to the element of disappointment, and to the question of whether these characteristics or features reasonably might have aroused conflict with respect to the decision to buy or otherwise to encounter the product.

Id. at 1370.

[22]Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939).

[23]W. PROSSER, LAW OF TORTS 694 (1971); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 274 (1972); Shapo, *supra* note 20, at 1153-92.

high and plaintiff may not be able to establish it; nonetheless, if the reality of our marketing system is such that its impact on consumer behavior is considerable, then contributory or comparative negligence ought not to be a defense. Again, it might be possible to argue that such considerations are for a jury, affecting the comparison of fault. But, it seems to me again that this is a basic duty question in which the courts must determine whether the overall scene of product litigation demands that the law recognize that subtle but powerful influences encourage plaintiff behavior even though they may not always be provable in an individual case to the degree that plaintiff would desire.[24] This is a law-making function for the court and cannot be delegated to the vagaries of the individual case and the individual jury.

C. The Anti-Contributory Negligence Mechanism

The discussion with regard to contributory negligence in tort law generally proceeds from the premise that the defendant and plaintiff act independently. Through the confluence of events, their negligent acts coincide to cause damage. To be sure, the act of each must be within the realm of contemplation of the other for the proximate cause element to be made out for each party.[25] If the plaintiff is not within the scope of foreseeability of the defendant, or if the defendant's negligence is not within the scope of the plaintiff's foreseeability, then the nexus between the act of each to the injury of the opposing party is not established.

In product liability actions, the scenario is radically different. If the plaintiff is negligent, the tool of his negligence is the product of the defendant. Now, if we proceed one step further and determine that the defendant's negligence was in not providing a device which would prevent the plaintiff from misusing the product or unwisely assuming risk, it becomes evident that plaintiff's action in reacting to the defendant's product as expected should not bar or reduce his recovery. If the defendant is required by the law to build safety into a product in order to prevent a plaintiff's negligent response, it makes little sense to reduce defendant's liability exposure when the plaintiff has responded as expected.[26] To be sure, there is some deterrence to be accomplished by penalizing plaintiff for his

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[24]Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929); Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962).

[25]W. PROSSER, LAW OF TORTS 244-89, 421-22 (1971).

[26]Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972).

negligent conduct,[27] but the better argument is that the plaintiff's reactions were, in a sense, built into the product. It is no answer that the law recognizes comparative negligence in other instances when the plaintiff's conduct is foreseeble. This is admittedly so. Without foreseeability, there would be no proximate cause. The difference lies in the harsh reality that the act of negligence of the plaintiff and that of the defendant in a non-products case have independent significance separate and apart from each other. In a products liability action, if the defendant has failed to install an anticontributory negligence button or safety shield, we have decided that responsibility for that failure is the defendant's. To censure the plaintiff for failing to act reasonably when that was the very problem to be guarded against is to march up the hill in order to march down again.[28]

II. Comparing Negligence and Strict Liability

Although for the reasons set forth above I oppose across-the-board application of comparative negligence in product liability actions, it should be noted that the grounds for my opposition are substantive, not doctrinal. Opposition to the comparative negligence doctrine in strict product liability cases has been voiced by those

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[27]Fleming, *Forward: Comparative Negligence At Last—By Judicial Choice*, 64 Calif. L. Rev. 239, 270 (1976); Schwartz, *Strict Liability and Comparative Negligence*, 42 Tenn. L. Rev. 171, 179 (1974).

[28]This is a restatement of the classic argument against use of the assumption of the risk doctrine. *See* James, *Assumption of Risk: Unhappy Reincarnation*, 78 Yale L.J. 185 (1968). Care must be taken to guard against permitting affirmative defenses or proximate cause arguments from destroying duties which the law has labored to develop. A recent example of a court's sensitivity to this problem is Parvi v. City of Kingston, 41 N.Y.2d 553, 362 N.E.2d 960 (1977). The facts in this case concern two drunks who were picked up by the police and run out of town in order to dry out. The drunks were deposited outside of town several hundred feet from the New York Thruway. One was killed and the other seriously injured by an onrushing car. The court first recognized a clear duty on the part of police to act reasonably *vis-a-vis* the drunks after they had been picked up. The defendant argued that it was the act of the drunks and not that of the policemen which was the proximate cause of the accident. In response, Judge Fuchsberg, speaking for the majority, said:

> To accept the defendant's argument, that the intoxication was itself the proximate cause of Parvi's injury as a matter of law, would be to negate the very duty imposed on the police officers when they took Parvi and Dugan into custody. It would be to march up the hill only to march down again. The clear duty imposed on the offiers interdicts such a result if, as the jury may find, their conduct was unreasonable. For it is the very fact of plaintiff's drunkenness which precipitated the duty once the officers made the decision to act.

41 N.Y.2d at 555, 362 N.E.2d at 965 (citations omitted).

who fail to see how one can compare the strict liability of the defendant—a no-fault doctrine—with the negligence of the plaintiff—a fault doctrine.[29] In some instances, this doctrinal problem has been considered so serious that it has caused courts to proclaim that strict liability is the equivalent of negligence per se.[30] In another forum, I have examined this phenomenon at great length.[31] The short answer to the dilemma of how one can compare strict liability and negligence is that one must simply close one's eyes and accomplish the task. To be sure, we must blind ourselves somewhat to pristine tort analysis, but the compromise in principle is not extreme and should not bar us from what we believe to be a legitimate reduction in plaintiff's verdict.

There are two methods for accomplishing the reduction.

A. Focus on Plaintiff's Conduct

If the purpose of comparative negligence is to reduce plaintiff's recovery by assessing the role that plaintiff's conduct played in causing his injury, then we are really not involved in a strict comparison of fault. Instead, what we are doing is viewing the injury event in totality and then asking ourselves if it is fair to allow the plaintiff full compensation for an injury event in which he played an important role. Although some comparison is inevitable, the reduction is essentially accomplished by looking at plaintiff's conduct. The draft Uniform Comparative Fault Act, reflecting this basic perspective, provides:

> (a) In an action based on fault, to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the award of compensatory damages, but does not bar recovery, whether or not the contributory fault previously constituted a defense, and including situations in which last clear chance was formally applied.
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> (b) "Fault" includes negligence, recklessness, breach of implied warranty, conduct subjecting the actor to strict tort liability, unreasonable assumption of risk, and failure to

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[29]See authorities cited in note 3 *supra*.

[30]Howes v. Deere & Co., 71 Wis. 2d 268, 273-74, 238 N.W.2d 76, 80 (1976); Dippel v. Sciano, 37 Wis. 2d 443, 461, 155 N.W.2d 55, 64 (1967). *See also* Atkins v. American Motors Corp., 335 So. 2d 134 (Ala. 1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976).

[31]Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977).

> avoid or mitigate damage. The fault must have an adequate causal relationship to the damage suffered.[32]

Note that the emphasis is not so much on the comparative aspects of the action; reduction is accomplished by diminishing the award according to the plaintiff's contributory fault.[33]

B. Equating Defect with Fault

If the administration of justice had to be reconciled with philosophical purity, then comparison of fault in strict products liability would not be possible. However, we know that the reasons for adopting strict liability are multifarious. They stem from a desire to change risk distribution principles, to fulfill consumer expectations, and to free the plaintiff from proving fault when it is supposed that fault is present but cannot be easily demonstrated.[34] Given such a multiplicity of reasons for the adoption of strict liability, it is not untoward to suggest that the seriousness of defect should be equated in some rough sense with a percentage of fault. The draft Uniform Comparative Fault Act suggests the following:

> In determining the percentage of fault allocable to each party, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party and the extent to which and directness with which the conduct contributed to cause the damages claimed.[35]

In short, it is my thesis that it is simply incorrect to apply comparative negligence to a broad range of product liability cases. But the reason for not applying comparative negligence has little or nothing to do with the technical problem of making the comparison.

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[32]The quotation is taken from the May 1, 1977 draft of the Uniform Comparative Fault Act, section 1 [hereinafter cited as May 1, 1977 Draft]. An earlier version of the Act is discussed in Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 U. MICH. J. LAW REF. 220 (1977) [hereinafter referred to as Wade, *Uniform Act*]. The proposed act is scheduled for presentation to the National Conference of Commissioners on Uniform State Law in Vail, Colorado, July 29 through Aug. 5, 1977.

[33]An earlier version of the Uniform Comparative Fault Act emphasized this theme by stating that contributory negligence by the claimant "diminishes the award of compensatory damages proportionately according to the measure of fault attributed to the claimant." *See* Wade, *Uniform Act*, *supra* note 32. See also WIS. STAT. § 895.045 (1973); N.Y. CIV. PRAC. LAW § 1411 (McKinney Supp. 1975).

[34]Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

[35]Uniform Comparative Fault Act, May 1, 1977 Draft, *supra* note 32.

That issue is, in my opinion, a red herring and should be so identified. The policy reasons for not applying the defense depend on a careful identification of the type of case in which the comparative fault defense will produce an unjust result. Neither the broadside attack on comparative fault nor its uncritical acceptance demonstrates a fact-sensitive analysis worthy of acceptance.

III. Abuse of Comparative Negligence

A. The Second-Collision Case

The prototype for this problem is *Ellithorpe v. Ford Motor Co.*,[36] in which plaintiff was injured when she was unable to stop her car on a wet road and caused a rear-end collision with another car stopped in front of her. The suit was brought against Ford Motor Co. for second-collision injuries. The hub of the plaintiff's steering wheel was padded, but in the middle of the padding Ford had inserted a plastic Ford emblem from which three sharp prongs protruded. The emblem with the prongs extended above the surface of the padding. Plaintiff suffered severe injuries upon impact when her face struck the insignia on the steering wheel.

In a well-considered opinion, the court decided to cast its lot with those courts which impose second-collision liability. Following the leading case of *Larsen v. General Motors*,[37] the court found that an automobile manufacturer has a duty to design a reasonably safe automobile. Since collisions are a foreseeable phenomenon, the manufacturer must utilize a reasonably safe design to minimize the effects of collisions. The court then faced the question of whether the plaintiff's possible contributory negligence in causing the collision should be a bar to recovery. Relying on *Restatement* § 402A, Comment (n), the court held that a plaintiff's contributory negligence in failing to discover a defect or guard against the possibility of its existence, is no defense to a strict liability action. Comment (n) provides:

> Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory

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[36]503 S.W.2d 516 (Tenn. 1973).

[37]391 F.2d 495 (8th Cir. 1968).

> negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Although I am in agreement with the result reached by the court, my reasons for supporting the court's decision are not limited to the fact that plaintiff's cause of action was based on strict liability rather than negligence. The considerations I have outlined earlier have direct bearing on the *Ellithorpe* problem. First, the fault of the defendant was in designing a product which was not merely capable of causing harm, but which would almost inevitably do so. The Ford emblem on the hub of the steering wheel was destined to be implanted in some plaintiff's forehead; the large number of Fords which bore that design assured this result. Second, requiring design for second-collision safety serves the purpose of protecting the negligent as well as the non-negligent driver. It is simply inconceivable that the law would seek to discriminate against the negligent driver in a second-collision situation. A collision is a collision is a collision. It is the defendant's responsiblity to build in sufficient safety to provide plaintiff, in the helpless state of reacting to a first collision, with as much protection as reasonably possible.[38]

These arguments seem equally compelling to me whether the defense is contributory negligence or comparative negligence. The decision made in declaring the design defective includes an assumption that the plaintiff is deserving of protection. Responsibility for

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[38]Tort buffs will find that this argument bears a striking resemblance to the "last clear chance" doctrine. Under this doctrine a plaintiff's contributory negligence will not be a bar if defendant had the last clear chance to avoid the injury. *See* W. PROSSER, LAW OF TORTS 427 (4th ed. 1971); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938). Although some states have retained the last clear chance approach even after the adoption of comparative negligence, the better argument is that last clear chance should not survive the advent of comparative negligence. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 7.3 (1974).

The reason is that last clear chance was a crude method of comparing fault, thus negating the harsh effects of contributory negligence as a complete bar. With comparative negligence it is now possible to directly confront the nature of plaintiff's contributory fault and reduce his recovery accordingly. In some instances, however, it may be proper to utilize the last clear chance approach to assist the courts in deciding whether to engage the comparative fault doctrine. In a case when the defendant's initial design responsibility is to protect against a helpless plaintiff there are strong policy grounds for not recognizing contributory fault even in its comparative modality.

that protection should not be lessened merely because the plaintiff happened to be travelling too fast for road conditions at the time of the accident. If the law is concerned about deterring plaintiff negligence through the comparative negligence doctrine, that result can be accomplished in cases such as this by reducing plaintiff's recovery for first-collision injuries against another negligent driver. It should not reduce, by one farthing, her recovery against Ford Motor Company. Ford had no right to bargain for a better plaintiff, since the second collision could have occurred just as easily with a non-negligent plaintiff. It might even be argued that plaintiff's negligence in driving is not the proximate cause of her second-collision injuries. Plaintiffs have no reason to foresee that the automobiles they ride in are booby trapped to cause enhanced injury in case of collision. However, it should not be necessary to resort to tortured arguments to accomplish sensible and just results. Comparative negligence ought not to diminish clearly delineated duties merely because a compromise formula is extant.

Care must be taken to define the relationships between the parties so that the fundamental goals of comparative fault are accomplished. Slight variations in fact patterns may change the policy implications drastically. *Horn v. General Motors Corp.*[39] illustrates the principle. Plaintiff, while driving her car, was forced to swerve to avoid a car which had suddenly swung into her lane of traffic. As she steered to the right, plaintiff brought her left hand across the horn cap in the center of the steering wheel. The horn cap was defectively designed in that it was too easily removable. Below the horn cap were three sharp prongs which held it in place. Plaintiff's chin collided with the sharp prongs and she suffered serious injury.

Plaintiff sought to hold General Motors liable for the aggravation of her injuries due to the defective design of the horn cap and the sharp prongs. In affirming a jury verdict for the plaintiff, the court was faced with the contention that if plaintiff had been wearing her seat belt her injuries would have been much reduced. The court, citing its previous decision in *Luque v. McLean*,[40] held that the only defense to a strict liability action was voluntary and unreasonable assumption of a known risk. Since there was no evidence that plaintiff was aware that the car had an easily removable horn cap which masked sharp prongs, the defense was not allowed.

The dissent by Justice Clark raised the issue of comparative negligence. He argued that California's judicial adoption of com-

[39]17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976).

[40]8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972).

parative negligence in *Li v. Yellow Cab Co.*[41] should govern in this instance. He contended that the equitable principles of comparative negligence should operate in a strict liability situation as well.

If second-collision liability is to be imposed on General Motors, it is because there is a need to protect plaintiffs—even negligent or contributorily negligent plaintiffs—from needless injury when cars collide. The fault of General Motors is in not designing its car so that when a driver is involved in a collision his injuries will not be aggravated. The foreseeability and liability of General Motors could thus logically attach even to a non-belted plaintiff. An argument can, however, be made that in this particular case, plaintiff's verdict ought to be reduced by the percentage of her fault. A court might take the position that unlike the situation in *Ellithorpe v. Ford*,[42] where the plaintiff's negligence was in the driving of the car, and the car manufacturer's liability protected the negligent and non-negligent driver alike, in the *Horn* case the negligence of the plaintiff was in a sense identical with that of the defendant. Although the defendant failed to take precautions to protect the plaintiff from second-collision injuries, it must be admitted that the plaintiff failed to take precautions to prevent second-collision injuries as well.[43] These issues are difficult and will require careful attention by the courts. The position of the majority, declining to consider comparative negligence in a strict liability situation, and that of the dissent, uncritically accepting the doctrine, both seem wrong.

It might be argued that the inherent intractability of the problem militates in favor of simply sending all cases in which plaintiff fault is a factor to a jury under a comparative negligence instruction. Yet, I cannot divest myself from the belief that law-making power, in its finest sense, belongs in the hands of the judge.[44] Clear doctrine will not emerge overnight; but when it does emerge it will reflect the best judicial assessment of where the duties and responsibilities ought to lie, rather than the foggy non-policy which is the product of comparative fault analysis.

B. Design Defect—Protecting Plaintiff From Decision-Making

In a recent case, plaintiff was injured while working on a Pan-O-Mat machine, an apparatus designed to receive roll-shaped pieces of

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[41]13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[42]503 S.W.2d 516 (Tenn. 1973).

[43]The injuries suffered by a plaintiff due to failure to wear a seat belt are second collision injuries. They are usually occasioned after initial impact with an external force, which is the primary or first collision.

[44]The author's sympathies on this question lie with Leon Green. See authorities cited in note 24 *supra*.

bread dough from another machine. At the transfer point the dough occasionally misses the appropriate cup and falls to the floor beneath the Pan-O-Mat. In order to collect the fallen dough, the machine is equipped with an "excess" tray which fits beneath it. Usually, the excess tray can be removed and emptied without opening the guard doors which block access to the working mechanism of the machine, including gears, sprockets, etc. On this occasion the tray was so overfilled that the only way to get it out was to open the guard door. The machine continued to operate while the guard door was open and plaintiff noticed that while the tray was away there was a new accumulation of dough under the machine. He bent down to clean the area and lost his balance. His arm became entangled in the chain and sprocket mechanism, resulting in eventual loss of his arm through amputation.

The court, in *Schell v. AMF, Inc.*,[45] found that under the above-stated facts defendant was entitled to a directed verdict. It is interesting to reflect on two of the plaintiff's allegations of design defect in *Schell:*

> (1) The absence of an interlock mechanism which would shut down the machine when a guard door is open; and
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> (2) The use of closing mechanisms on the guard doors which allow the door to be opened quickly and without reflection.

We have heretofore focused on parameters of product design which should protect a plaintiff when he either fails to inspect a product or fails to contemplate that the product may not always function properly. I should now like to suggest that in certain instances when plaintiff is voluntarily and unreasonably assuming a risk his recovery ought not to be barred, nor should it be reduced, under the comparative negligence doctrine. I realize that this flies in the face of the wisdom of the *Restatement* § 402A, comment (n), which provides that unreasonable assumption of the risk is a defense to a product liability action. Nevertheless, logic would appear to demand the result I am suggesting.

As noted above, the court in *Schell* held for defendant, because it reasoned that defendant had no duty to manufacture a machine which would prevent a plaintiff from putting himself at so obvious a risk.[46] The court squarely faced the duty issue and found against the plaintiff. But surely the courts that have recently overruled the patent danger doctrine might take a more charitable view of such a

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[45]422 F. Supp. 1123 (M.D. Pa. 1976).

[46]*Id.* at 1126.

design defect.[47] A court might very well determine that an interlock mechanism which prevents plaintiffs from voluntarily placing their limbs in moving parts is a desirable safety feature. If a court were to require such a safety device, it would do so because it decided that plaintiff should be protected from foolish decision-making. In the *Schell* case, one could not even argue that such a safety device should be included to protect inadvertent plaintiffs;[48] such accidents will happen only if plaintiffs decide to take risks, either reasonably or unreasonably. Thus, the clear conclusion of such a decision would be that the defendant is in a far better position than plaintiffs to prevent such accidents, and such a conclusion should not be undone by the application of comparative negligence.

One might argue that by using comparative negligence we will be providing a pressure point on plaintiffs as a class to prevent injuries as well as defendants. Clearly, when we are considering voluntary activity on the part of plaintiffs, this is a worthwhile consideration, but I believe in balance it fails. First, if we create a duty to design safety into the product in a situation in which, if injuries occur, they will almost certainly result from some voluntary activity on the part of plaintiff, the net result is that in every case some reduction of award is bound to take place. Since that is the nature of the beast, we really have not created a full duty of safety, but something like a half-duty. Perhaps the short answer to a plaintiff deterrent argument is that the defendant's safety device would have eliminated plaintiff misjudgment, a goal which the law should foster totally, not partially. Second, and more important, we dare not fool ourselves as to the kinds of questions which will occupy the minds of jurors in assessing the fault apportionment. They will not only be assessing the reasonableness of the plaintiff's activity, they will be taking into account the pressure of the job, the state of unemployment, the ease of plaintiff entry into the job market, whether plaintiff is working by the hour or under an incentive plan, etc. One must consider whether such fundamental policy questions should be compromised by comparative negligence or should rather be squarely confronted by a court. My own strong preference is for a clean-cut duty decision.[49] Those who disagree will have to own up to the reality that major law-making responsibility is being delegated to juries. What will emerge are not crisp rules which will provide manufacturers and employers with guidance about their societal respon-

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[47]See cases cited in note 17 *supra*.

[48]*See* Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Area*, 60 IOWA L. REV. 1, 21 (1974).

[49]See note 44 *supra*.

sibilities, but rather an untutored compromise translated into the language of percentage fault.

C. Testing the Product Within the Normal Use Tolerance

The clearest case in which the plaintiff's negligence ought not to be a factor in recovery arises from express warranty cases. The classic case is, of course, *Bahlman v. Hudson Motor Car Co.*[50] In *Bahlman*, the defendant auto manufacturer expressly warranted that its car roof had no seams and no ragged edges. Plaintiff's car overturned as a result of his negligent driving and his head was cut by the jagged edges of the seam. Rejecting the contention that contributory negligence should be a bar, the court said:

> Under such rule, although a manufacturer had falsely advertised that a windshield was made of shatterproof glass, as in the now famous case of *Baxter v. Ford Motor Co.*, . . . he would be allowed to escape the consequences of that deliberate misrepresentation because the plaintiff was exceeding the speed limit when a pebble flew up and shattered the glass. . . . It is undoubtedly true that [in the instant case] the negligence of the driver caused the car to overturn, but defendant's representations were not for the purpose of avoiding an accident, but in order to avoid or lessen the serious damages that might result therefrom. . . . The particular construction of the roof of defendant's cars was represented as protection against the consequences of just such careless driving as actually took place. Once the anticipated overturning of the car did occur, it would be illogical to excuse the defendant from responsibility for these very consequences.[51]

A more recent example, in which the warranty aspect is less explicit, is *Vernon v. Lake Motors.*[52] About eight and one-half months after the Vernons purchased a Mercury Marquis, Mr. Vernon drove the car and noticed smoke coming from the windshield wipers. In addition, the wipers would not shut off. His local Ford agency refused to fix the car since he had not purchased the car through that agency.

Mrs. Vernon decided to drive the car forty miles to Salt Lake City the morning immediately following the "smoking event." Her

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[50]290 Mich. 683, 288 N.W. 309 (1939).

[51]*Id.*, 288 N.W. at 311-12.

[52]26 Utah 2d 269, 488 P.2d 302 (1971).

reasons for doing so were several. First, she wanted to take the car to Lake Motors, the agency from which she purchased the car, for its 10,000-mile check-up. Second, she wanted to attend a dance recital in which her grandaughter was to perform. Concerned about the smoking incident, Mrs. Vernon went out to the car, turned the motor on, and let it run to see if smoke was accumulating in the car. The wipers would not turn off but, since it was storming, she needed them in any event. Her testimony was that she believed the worst that could happen was that some fuses would blow out. About three-fourths of the way to Salt Lake City, a fire started under the instrument panel and the car was devoured by fire.

In evaluating the contention that plaintiff's contributory negligence, as distinguished from assumption of the risk, ought to bar her recovery, the court said:

> [F]irst, we agree with the principle that even if there be breach of warranty, there may be circumstances under which the plaintiff's own conduct would preclude his recovery. We are aware that it is sometimes said that contributory negligence is not a defense to such an action. *This may well be true if the effect of his conduct is simply to put the warranty to the test; this does not and should not eliminate the warranty, nor defeat a plaintiff's right to proper recovery for its breach.*[53]

The court then considered whether the plaintiff had voluntarily and unreasonably assumed a known risk. Here, too, the court considered the fact that plaintiff had good reason to believe that nothing would be seriously wrong with a new car and remanded the issue for jury determination as to whether plaintiff's conduct was voluntary and unreasonable.

It should be noted that the warranty in this case was the standard new car warranty and not one specifically directed at some special aspect of product performance, as in *Bahlman*. Nevertheless, the court held that the general reliance of plaintiff on the representations of product liability should bar utilization of contributory negligence as a defense absent a clear case of assumption of the risk. Plaintiffs have a right to expect that a product will perform as represented. What is most interesting in the *Vernon* case is the court's willingness to consider the manufacturer's representations despite the fact that evidence of product failure had come to the plaintiff's attention. The court apparently agreed that even when a product is malfunctioning the plaintiff may justifiably believe that

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[53] *Id.*, 488 P.2d at 304 (emphasis added).

the product is not unreasonably dangerous—i.e., the most that could happen is that a fuse would blow. For reasons which I shall go into shortly, I believe that this well may be an appropriate case for comparative negligence; yet, it is significant that the Utah court recognized that testing the warranty is generally not grounds for denying a plaintiff recovery on the basis of contributory fault.

The *Vernon* case raises rather special problems, because the plaintiff had reason to believe that something serious was wrong with his product. The classic case of "testing the warranty" in modern product liability law falls between *Bahlman* and *Vernon.* Its paradigm is demonstrated by the following hypothetical:

> Plaintiff is injured when a poorly beaded tire on his car blows out. At the time of the accident the plaintiff is speeding twenty miles per hour over the limit. There is evidence that had plaintiff been driving at the lawful speed limit he would have been able to bring his car under control and could have avoided impact with another car.

Note that in this instance we are not dealing with a highly specific warranty such as *Bahlman;* nor are we confronting a plaintiff who has some specific knowledge that something is wrong with the product. The problem here is what the authorities have called contributory negligence in failing "to guard against" the possible existence of a defect.[54] In reality, this description of the problem is a misnomer, because the true negligence of the plaintiff is not in failing to consider the possibility that the product might fail while in negligent use. Why should the plaintiff consider the possibility of product failure at a speed of fifty miles per hour? Clearly, he would not be negligent if he was travelling fifty miles per hour in a fifty mile per hour zone. Why should he guard against the defect merely because he is travelling fifty miles per hour in a thirty mile per hour zone? The true question is whether non-product contributory negligence—generally negligent conduct unrelated to the product—should bar the plaintiff in a case against a defendant manufacturer.

In this type of case, I believe that the analogy is very close to *Bahlman:* plaintiff's negligence should not enter at all into the product liability action even under the guise of comparative negligence. The plaintiff has been sold a product which has created in his mind a set of consumer expectations with regard to performance. At fifty miles per hour the plaintiff has a right to total reliance on the assumption that the product will function as marketing has

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[54]RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

represented. It is of no great consequence that we may not be able to make out a technical case of express warranty or misrepresentation; the realities to the consumer are precisely the same. In short, when the consumer is using the product within the clear parameters of its normal functioning mode, the general or non-product contributory negligence should not enter into the picture, even as comparative negligence. The factor of reliance on product performance is so significant that it is simply unfair to penalize the plaintiff for relying on the set of consumer expectations which the defendant led him to rely upon.

IV. Appropriate Use of Comparative Negigence in Product Liability

A. Plaintiff's Duty—Maintenance and Repair

The thrust of my objection to the use of comparative negligence in products liability has been that plaintiff's role in *product* failure is insignificant. If the defendant-manufacturer bears responsibility for product integrity, that responsibility ought not to be diminished because of certain kinds of plaintiff behavior *which are not directed to product integrity.* There are, however, cases in which it is quite correct for the law to require plaintiff to address himself to the question of product performance. In such cases, either because of the nature of the product or the nature of the product failure under consideration, it is just, as a matter of policy, to ask the plaintiff to become a product risk-avoider.[55]

In our earlier discussion, we focused on *Vernon v. Lake Motors,*[56] in which the car signalled to its user that it was in need of repair. As a matter of policy, we must recognize that we live in a world where products break down for a variety of reasons. If the product has signalled to its user, "fix me," and if a reasonable person under the circumstances should have undertaken repair, it would seem appropriate to reduce the plaintiff's verdict by the percentage of his fault. Note that in this instance there are concrete, constructive steps that plaintiff should have undertaken to help in restoring product integrity. Certain products will demand that maintenance and repair be undertaken. They call for a joint responsibility between manufacturer and consumer. Admittedly, the problem arises from a defect in the product which should not have been there. Yet the nature of the product is such that society will place duties on the

[55]Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts,* 81 Yale L.J. 1055 (1972).

[56]26 Utah 2d 269, 488 P.2d 302 (1971).

consumer to help in maintaining its integrity. There are many reasons for this in the case of automobiles. The auto is a product designed for long-term use. Regular inspections are necessary, in any event, for general safety purposes, and it is well known that debugging problems with automobiles are such that periodic checks are necessary. For all these reasons, it becomes clear that plaintiff plays a role in repair and maintenance and it is thus fair to apportion the loss which arises from the failure of both parties to meet their joint burden with regard to product liability.

B. Product Misuse—Pushing the Product to Its Limits

In our earlier discussion, we focused on a plaintiff who was speeding on a poorly-beaded tire which failed at fifty miles per hour, a use of the product which was within the clear parameters of normal use. This fact situation represents the problems that exist at one polarity. For the reasons discussed earlier, I believe that comparative negligence should not be utilized to reduce plaintiff's recovery where the use is so clearly within the represented performance capabilities of the product. At the other extreme lie the cases in which the product misuse is so extraordinary that even if there is a defect we are unprepared to impose liability, since our judgment is that the product defect is not the proximate cause of the harm.[57] Thus, if tires designed and sold to be used only for normal driving are used for stock-car racing at extremely high speeds, recovery will be denied. It will be denied even if the product was, in fact, defective and a cause in fact of the harm. The use to which the product has been put is such that we are unwilling to saddle the manufacturer for losses which arise from activity which is so tangentially related to the product he has marketed. There does, however, exist a middle range in which comparative fault could play a role. Perhaps in a world of more honest and forthright marketing there would be no need to consider the interplay we are about to examine. However, in the real world it is clear that the scope of foreseeable use is a very delicate question. Consumers often use products to the very edge of the product's capabilities, and it is in this gray area where many accidents occur. One might argue that it is a manufacturer's duty to clearly identify the limits of product performance, but the millenium has yet not arrived. What we often encounter is a

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[57]McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1963); Helene Curtis Indus. v. Pruitt, 385 F.2d 841 (5th Cir.1968); RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

product whose use parameters are not well-defined and a plaintiff who knows that he is probably pushing the product to its limits and perhaps beyond. In this kind of situation, comparative negligence can play a role.

Hoelter v. Mohawk Service, Inc.[58] raises the problem. Plaintiff was speeding along in his 1964 MGB sports car at a rate of approximately eighty miles per hour. The posted speed limit was fifty-five miles per hour. He had attempted to overtake another car and when he tried to return to his lane the car began to fishtail. The car went out of control, seriously injuring the plaintiff. Plaintiff's MGB was outfitted with Pirelli studded snow tires. It was his contention that the accident was caused by the manner in which the metal studs had been inserted. Defendant, of course, claimed that the plaintiff's driving was the sole cause of the accident. The advertising brochure for the Pirelli tires read as follows:

> "A remarkable snow tire . . . Step on the accelerator, change gears, take a curve or hit the brakes—Pirelli Invernos grip . . . and hold . . . When using studded tires sustained speeds should not exceed 70 miles per hour."

If the plaintiff were speeding at sixty-five miles per hour and the tires failed, thus contributing to his injuries, I would argue that plaintiff's speeding should neither bar nor reduce his recovery against the tire manufacturer. Plaintiff had been encouraged to use the tire at substantial speed with the assurance that the tire will not fail. But intermittent speeds of eighty miles per hour are clearly a problem area. The manufacturer has not clearly proscribed this kind of use, but plaintiff has grounds to believe that the product is being tested at its limits. To reduce plaintiff's recovery against the manufacturer in this instance by a percentage of his fault thus seems altogether proper.

V. Trading Cause for Fault

It is standard practice when teaching comparative negligence to freshman law students to emphasize the difference between apportionment of damages and comparative negligence, either between plaintiff and defendant or two defendant tortfeasors. Traditional teaching is that a defendant should never pay for a harm which he did not cause.[59] Thus, for example, when it is clear that one defendant injured the plaintiff's right arm and another his left arm, each

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[58]170 Conn. 495, 365 A.2d 1064 (1976).

[59]W. Prosser, Law of Torts 236 (4th ed. 1971).

defendant will pay only for the harm he caused.[60] If, on the other hand, we have concurrent tortfeasors who have caused a plaintiff a single indivisible injury, then both are jointly and severally liable.[61] In a contribution action, if damages are to be apportioned between them, apportionment will not be based on the dollar amount of damages they respectively caused, since that cannot be determined, but on the basis of comparative fault.[62] Similarly, under the doctrine of avoidable consequences, when a plaintiff is responsible for adding to the harm which defendant brought upon him, his recovery is reduced by the amount which his own negligence caused.[63] On the other hand, when the harm is single and indivisible, the plaintiff's negligence, in a comparative negligence jurisdiction, reduces his recovery by the percentage of the plaintiff's fault.[64]

In short, cause in fact is an all-or-nothing question. If harm can be clearly identified as attributable to one party, then we are faced with an apportionment of damages question based on cause in fact. If the harm cannot be logically identified as emanating from one source or another, then the damages must be apportioned on some basis of fault.

This analysis, although simple and straightforward, will no longer suffice. From a broad range of sources, we are coming to learn that the comparative fault doctrine may signal the beginning of the end of the all-or-nothing causation principle. If, indeed, my reading of the signals is correct, we may be witnessing a significant revolution in the law of torts. The seat-belt cases have brought the issues into sharp focus. Courts have differed sharply in their approach to this problem. Most have rejected the defense entirely.[65]

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[60]Louis v. Oakley, 50 Haw. 260, 438 P.2d 393 (1968); McAllister v. Pennsylvania R. Co., 324 Pa. 65, 187 A. 415 (1936).

[61]Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F.2d 213 (6th Cir. 1974); Maddux v. Donaldson, 362 Mich. 425, 108 N.W.2d 33 (1961).

[62]The majority rule, until the advent of comparative fault, held that contribution should be equal, depending on the number of joint tortfeasors. See W. PROSSER, J. WADE & V. SCHWARTZ, CASE AND MATERIAL ON TORTS (6th ed. 1976). The trend toward a comparative fault principle in contribution received strong impetus from the landmark decision of Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See* Aushel, *The Impact of New York's Judicially Created Law Apportionment Amongst Tortfeasors*, 38 ALBANY L. REV. 155 (1974). The May 1, 1977 draft of the Uniform Comparative Fault Act, Section 4 adopts the comparative fault principle for contribution.

[63]Green v. Smith, 261 Cal. App. 2d 392, 67 Cal. Rptr. 796 (1968); Dohmann v. Richard, 282 So. 2d 789 (La. Ct. App. 1973); Zimmerman v. Ausland, 266 Ore. 427, 513 P.2d 1167 (1973).

[64]*See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

[65]Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970); Clark v. State, 28 Conn. Super. 398, 264 A.2d 366 (1970); Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d

However, two courts that have seen fit to recognize the defense have taken very different approaches to the problem of reducing the plaintiff's recovery.

A. Apportionment of Damages

In *Spier v. Barker*,[66] the New York Court of Appeals, prior to the adoption of its comparative fault statute, adopted the seat-belt defense.[67] It took the position that plaintiff should have his recovery reduced by the *amount* the injury would have been reduced had the plaintiff been wearing his seat belt. Thus, if defendant were travelling thirty miles per hour over the speed limit and lost control of his car, colliding with a non-belted plaintiff, the defendant would only be liable for the damages caused by the first, car against car, collision. The defendant would not be liable for the add-on injuries which resulted because the plaintiff failed to wear his seat belt. It should be noted that this is a straight cause-in-fact analysis. Defendant should only be liable for the damages which he caused. Since plaintiff had an opportunity to mitigate damages in advance of the accident by buckling up—a case of avoidable consequences—he is required to bear that loss.[68]

B. Comparative Negligence

In *Bentzler v. Braun*,[69] the Wisconsin court faced the same question and decided that the plaintiff's award in a seat-belt case should be reduced by the percentage of plaintiff's fault. If there is evidence that a causal relationship exists between the failure to wear the seat belt and the aggravation of plaintiff's injuries, fault apportionment between the parties can be undertaken.[70] Thus, in seeking to

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606 (1969); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Robinson v. Lewis, 254 Or. 52, 457 P.2d 483 (1969).

[66]35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

[67]New York adopted the "pure" form of comparative negligence for causes of action accruing on or after Sept. 1, 1975. N.Y. Civ. Prac. Law § 1413 (McKinney Supp. 1975). It is possible that New York would have opted for the comparative negligence approach to the seat belt question rather than the avoidable consequences approach if New York had approved a comparative negligence doctrine at the time the court was faced with Spier v. Barker, 42 App. Div. 428, 431, 348 N.Y.S.2d 581, 583 (1973). There is an intimation to that effect in the Appellate Division decision. *See* text accompanying note 72 *infra*.

[68]35 N.Y.2d 444, 451, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 921 (1974).

[69]34 Wis. 2d 362, 149 N.W.2d 626 (1967).

[70]It should be noted that even under Bentzler v. Braun there must be evidence that there was a causal relationship between the failure to wear the seat belt and the aggravated injuries. This is, however, far different from the approach of the New York

discover a method of reducing plaintiff's recovery in a seat-belt case, the Wisconsin court shunned an apportionment of damages or cause-in-fact analysis and opted for a comparative fault approach.

The Wisconsin approach to the problem appears to be far superior to that dictated by *Spier v. Barker*.[71] In the hypothetical discussed earlier, defendant was speeding at thirty miles per hour over the limit and crossed the median strip, colliding with the plaintiff's car, throwing the plaintiff and injuring him seriously. Let us assume that total damages were $100,000. If expert testimony establishes that if plaintiff had been wearing a seat belt he would have suffered only $10,000 damages, then his recovery will be limited to that amount. The $90,000 add-on injuries would fall on the plaintiff, since they were due to his failure to buckle up. This would be the result of apportioning damages under *Spier*. Under the Wisconsin comparative fault approach, a jury would be entitled to reduce plaintiff's recovery by assessing plaintiff's fault in the overall injury situation. It would appear that the Wisconsin result would come closer to rendering justice in this situation.

C. *Apportioning Damages and Then Comparing Fault*

A third resolution of this problem might be to first apportion damages and then to accomplish the fault comparison on the second-collision or add-on injuries. The reasoning would be that the defendant is clearly responsible for all of the injuries which would have occurred even if the plaintiff had been wearing the seat belt, and the plaintiff is thus entitled to an undiminished recovery with regard to these injuries. It is only with regard to the add-on injuries that the fault comparison should be undertaken, since it is only with regard to the add-on injuries that joint fault took effect.

D. Comparing the Various Methods of Reducing Plaintiff's Claim

As I have already indicated, it would appear that the method which reduces plaintiff's award by apportioning damages can yield very harsh results. The fault apportionment is simple to administer but would seem unfair in that it deprives plaintiff of a percentage of award for which the defendant is clearly totally responsible. The third approach—apportioning damages and then apportioning fault—would seem to be the most sound analytical scheme for handling the problem.

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court in Spier v. Barker, 42 App. Div. 428, 348 N.Y.S.2d 581 (1973), where an exact damage apportionment was required to reduce damages.

[71]35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

The matter cannot, however, be disposed of so easily. Lest we forget, the courts have indicated reluctance to turn the courtroom into a theater for accident reconstruction games in which experts testify as to the hypothetical results which would have occurred had the plaintiff been wearing his seat belt.[72] Even in the case of simple fault apportionment, the jury is certain to have some evidence as to how significantly the seat belt would have reduced damages. To be sure, the exactness of a damage apportionment will be missing from the case, but the record will not be barren as to the possible saving effects of the seat belt. Taking this into consideration, it may well be that the Wisconsin method of straight fault apportionment is still the soundest approach. The jury will not be subjected to detailed evidence about the precise amount of damages that could have been averted by wearing a seat belt; they will simply make a gross judgment, taking into consideration the evidence on fault and the evidence on causation in one fell swoop.

E. Trading Cause for Fault

It should be evident that what we have been discussing is a phenomenon which can have broad application to the entirety of tort law. If in a cause-in-fact case what the New York court calls apportionment of damages the Wisconsin court treats as apportionment of fault, then perhaps the problems are not as discrete as our law professors have taught us to believe. The possibility of compromising both cause-in-fact and proximate cause questions, so that the percentage fault question would reflect our inability to make all-or-nothing decisions with regard to these issues, is an option which must be seriously considered. I would suggest that in addition to the seat-belt cases, recent cases in fairly unrelated areas have broached the compromise. Although, in general, the courts did not confront the topic with the kind of clarity that academicians would prefer, the cases speak for themselves.

1. Huddell v. Levin—A Strange Confession

On the early morning of March 24, 1970, Dr. Huddell, a psychiatrist, was driving his 1970 Chevrolet Nova en route to the Delaware State Hospital, where he was engaged in psychiatric research.[73] Dr. Huddell had purchased the car new and had installed

[72]Britton v. Doehring, 286 Ala. 498, 242 So. 2d 666 (1970); Lipscomb v. Diamini, 226 A.2d 914 (Del. Super. Ct. 1967).

[73]Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976). This decision vacated a superb opinion by Judge Cohen of the district court, 395 F. Supp. 64 (D.N.J. 1975).

head restraints as original equipment for both the driver and the front passenger seats. While travelling on the Delaware Memorial Bridge, Dr. Huddell's car ran out of gas. His car was brought to a full stop in the left-most southbound lane of traffic. He was seated belted in the driver's seat, and the blinker lights on his vehicle were in operation. The accident occurred when another car rear-ended the Huddell car at a considerable rate of speed. Upon impact, Dr. Huddell's head struck the head restraint on his car, resulting in extensive fracture to the occipital region of the skull. Because of a medical phenomenon known as "countercoup," by which the brain of a moving head striking a stationary object sustains injury opposite the point of impact, the frontal portions of Dr. Huddell's brain were extensively damaged. He died one day after the accident.

Plaintiffs brought suit against General Motors, Levin, the driver of the car which rear-ended Dr. Huddell, and Levin's employer, for whom he was driving at the time of the accident. The focus of the *Huddell* opinion, in the main, was with the liability of General Motors. It was the plaintiffs' contention that the head restraints were defective because they were designed with a relatively sharp edge of unyielding metal which allowed for excessive concentration of forces against the rear of the skull. As a result, the head came in contact with a thin metal plate rather than a flat surface which would have distributed the force over a larger area of the skull.

The Third Circuit, on appeal, affirmed the jury finding on defect. It then turned to a troublesome question. General Motors was clearly liable only for second-collision or add-on injuries caused by its defective head restraints. It was not liable for the harm caused to Dr. Huddell as a result of the primary collision. The two successive collisions—(1) Levin's car against Huddell's car, causing some injury to Huddell, and (2) Huddell against the defective head restraint—came in rapid-fire succession. It would be difficult, if not impossible, to divide the two events and separate the harms caused by each. The lower court took the position that these facts should be analogized to the chain-collision cases.[74] New Jersey had taken the position in those cases that the successive colliders should be treated as concurrent tortfeasors and thus jointly and severally liable for the *entire* injury, unless the defendant—the second collider—is able to prove that his damages are separable and that the amount of damages attributable to him are determinable.[75] For all

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[74]395 F. Supp. at 73.

[75]Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc., 53 N.J. 157, 249 A.2d 382 (1968); Hill v. Macomber, 103 N.J. Super. 127, 246 A.2d 731 (1968); RESTATEMENT (SECOND) OF TORTS § 433A (1965).

the persuasiveness of the analogy, Chief Judge Aldisert was unwilling to adopt it in a second-collision product liability case:

> The crashworthy or second-collision theory of liability is a relatively new theory, its contours are not wholly mapped, but one thing, at least is clear; the automobile manufacturer is liable only for the enhanced injuries attributable to the defective product. This being the essence of the liability, we cannot agree that the burden of proof on that issue can properly be placed on the manufacturer.[76]

So be it. The court, faced with a novel cause of action, was not prepared to treat this as anything other than a problem of apportionment of damages with the traditional burden of proof resting on the plaintiff. But then in a dramatic turnabout at the close of the opinion, the court made the following suggestion for the trial judge on remand:

> Upon retrial, the district court may request the parties to consider whether the New Jersey Supreme Court would be receptive to a rule kindred to the apportionment rule announced by the New York Court of Appeals in Dole v. Dow Chemical Co. that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties. The adjudication is one of fact and may be sought in a separate action . . . or as a separate and distinguishable issue by bringing in the third party in the prime action.[77]

The court recognized that this was a situation somewhat different from the normal comparison of fault between joint tortfeasors. *Dole*, they said:

> [d]id not implicate a combination of negligence and products liability; and it did not implicate the troublesome—and in our view *sui generis*—concept of second collision liability . . . it did represent a salutary judicial reevaluation of a tired common law doctrine that had long outlived purposes. The common law must accommodate changing conditions, new rights and remedies.[78]

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[76]537 F.2d at 738.

[77]*Id.* at 741 (citations omitted), *citing* Dole v. Dow Chem. Co., 30 N.Y. 2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[78]*Id.* at 742.

For all the language which indicates that the court is breaking new ground, the opinion fails to reveal just how novel the court's suggestion truly is. It will be recalled that the majority recoiled at the suggestion that the negligent driver and General Motors be treated as joint and several tortfeasors. The problem was one of apportionment of damages. General Motors, the second of the tortfeasors, was to be held liable only for the add-on injuries. Then, after reflection, the court suggested that General Motors and the driver Levin apportion *not damages, but fault* between them. Thus, for example, the driver might be found forty percent at fault and General Motors sixty percent at fault. It is irrelevant at this time to speculate whether this kind of apportionment would limit the liability of each party to the percentage of his own fault or whether, as in *Dole*, the parties would be jointly and severally liable to the plaintiff, with their rights *inter se* being affected by the fault apportionment.[79] The crucial point is that the court, faced with a difficult damage apportionment in which the plaintiff may be unable to segregate the harm caused by the second collision, has recognized that a tough damage question may perhaps best be resolved in fault apportionment.

2. *Barry v. Manglass—A Step Toward Comparative Causation*

The story of *Barry v. Manglass*[80] is a fascinating one. The supposedly major point for which the case will be cited is of anecdotal interest and will pass into twilight with other judicial opinions which deal with the auto recall question.[81] But for the cogniscenti, there lies hidden in the depths of this decision a veritable gold mine, of which it may be said, "Observe, tis truly new."[82]

The facts are humdrum. Gary Manglass was driving his 1969 Chevrolet Nova and took a turn on Old Route 202 going south at sixty miles per hour, clearly a foolhardy action. Apparently, upon reaching the southbound lane the car suddenly went out of control and began weaving from one lane to another. It ultimately hit a car in the northbound lane in which plaintiff Barry and others were occupants. Barry brought suit against Manglass for negligent driving and also joined General Motors as a defendant. The claim against

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[79]V. SCHWARTZ, COMPARATIVE NEGLIGENCE, §§ 16.3, 16.4, 16.7. *See* N.H. REV. STAT. ANN. § 507: 7-a (Supp. 1973); VT. STAT. ANN., tit. 12, § 1036 (1973); TEX. REV. CIV. STAT. ANN., art. 2212a, § 2(c) (West Supp. 1976-1977).

[80]55 App. Div. 2d 1, 389 N.Y.S.2d 870 (1976).

[81]*See, e.g.*, H.P. Hood & Sons, Inc. v. Ford Motor Co., 345 N.E.2d 683 (Mass. 1976).

[82]*Ecclesiastes* 1:10.

General Motors was that the 1969 Chevy Nova was manufactured with defective motor mounts which caused the car to go out of control.

The battle of the experts followed. Which came first—the chicken or the egg? Did the motor mounts fail, thus causing the collision, or did the collision occur first, thus causing the motor mounts to break? It was the contention of General Motors that the failure of the motor mounts followed Manglass' loss of control after he made the turn at too great a speed. On the other hand, the plaintiff's experts contended that the motor-mount failure preceded the accident and caused an unintended increase in the speed of the car as it was making the turn. The jury returned a verdict for plaintiff and, under the dictate of *Dole v. Dow*, which permits apportionment of fault between joint tortfeasors, found the liability of General Motors at thirty-five percent and that of Manglass at sixty-five percent.

A fault apportionment between tortfeasors on the basis of a percentage comparison is nothing novel. However, before one can assess fault against a tortfeasor causation must be established. The controversy in this case did not surround the issue of fault. There was evidence that General Motors had serious difficulties with the motor mounts on the 1969 Chevy Nova, and there was clear evidence that the driver was negligent. The battle of the experts was based on an assumption that a defect existed in the product when it left the hands of the manufacturer. The question to be decided was whether the harm was caused by the defect or the driving of Manglass. On this point the experts split sharply; the expert for General Motors claimed that the motor mounts failed post-collision and the plaintiff contended that it failed pre-collision.

The jury verdict on fault apportionment assessing thirty-five percent to General Motors and sixty-five percent to Manglass is difficult to reconcile with the testimony of the experts. If either of the experts is believed, then even if the fault of the parties can be assessed the cause aspect of the case cannot be compromised. Causation is, after all, an either/or issue. The motor mounts failed either before the collision or after the collision. If they failed after the collision, it would not seem to matter how much at fault General Motors was in bringing about the condition. It is possible, of course, that the jury found that both General Motors and the driver were concurrent tortfeasors, in that the defect of the car coincided with the negligent driving of the defendant Manglass to cause the accident, but the probabilities are strongly against such coincidence, since the expert testimony appears to have been unequivocal. If the jury did arrive at such a finding, it would be unsupported by the evidence which presented causation as an all-or-nothing issue.

There is an explanation for the jury finding that supports the thesis I have set forth. The normal standard of proof on causation is that plaintiff must establish the causal connection by the balance of probabilities.[83] If it is more probable than not that the defendant caused the harm, then causation is one hundred percent established. If it is less probable, then plaintiff has failed to make out his case. But, we all know that causation is never proven at a one hundred percent or a zero percent level. We treat the proof problem in a manner that is unrelated to reality. If, however, juries are presented with a mechanism to allow them to take into account the *likelihood, at a percentage basis,* that the defendant's fault caused the harm, then causation could be easily compromised and the issue removed from its all-or-nothing shibboleth.[84] Comparative fault presents to juries the mechanism for compromising difficult cause-in-fact questions. Again, it is possible that the Uniform Comparative Fault Act takes causation into account:

> In determining the percentage of fault allocable to each party, the trier of fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party and the extent to which and directness with which the conduct contributed to cause the damages claimed.[85]

Certainly it might help to clarify matters if the Act specifically provided for cause in fact as well as proximate cause,[86] but that is a

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[83]W. PROSSER, LAW OF TORTS 241 (4th ed. 1971).

[84]*See generally* Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability,* 81 U. PENN. L. REV. 586 (1933); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,* 43 U. CHI. L. REV. 69 (1975). The basic thesis reflected in the text is touched on by Professor Owen in his symposium article, *The Highly Blameworthy Manufacturer, supra* note 12. *See also* text accompanying notes 57-58 *supra.* Professor Owen argues:

> Thus, questions of causal linkage, rather than directly concerning metaphysical cause and effect, primarily involve questions of fairness to the parties concerning the *degree of proof* required to establish metaphysical causation. "The tendency to temper rules to fit moral conduct . . . in the field of certainty of proof" has been recognized on the damages side of tort law for some time. Courts have tended to administer the rules of causation "in such manner as to be most severe upon the intentional wrongdoer and more severe upon the reckless wrongdoer than upon the negligent wrongdoer." Thus, the manufacturer's blameworthiness may properly bear on the resolution of the cause in fact issue in certain products liability cases.

Id. at 780 (footnotes omitted).

[85]May 1, 1977 Draft, *supra* note 32, at § 2(b).

[86]The following modification is suggested: In determining the percentage of fault allocable to each party, the trier of fact shall consider, on a comparative basis, both the

minor matter. The tendency of courts to treat the cause-in-fact question in proximate cause terminology is well known.[87] The mechanism thus exists for plaintiffs to press comparative fault on the courts as a solution to difficult cause-in-fact questions. Comparative fault in the product liability area may yet turn out to be a substantial boon for claimants who may be able to use it to withstand directed verdicts and jury verdicts when evidence is less than overwhelming on causation.

VI. CONCLUSION

We have come full circle. Having begun this analysis on the premise that comparative fault is a damaging and unfair doctrine to apply indiscriminately against plaintiffs in product liability actions, we have concluded that it may yet turn out to be a boon to plaintiffs who face difficult causation problems. Yet, we need not abandon either position. Courts will have to examine each case on its facts to determine whether a fault comparison is proper. In some instances, it is clear that any reduction of plaintiff's recovery will negate basic duties that have been placed on manufacturers.[88] In other instances,

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nature and quality of the conduct of the party and the causal relation, both in the *cause-in-fact and proximate cause sense*, with which the conduct contributed to cause the damages claimed.

It should be noted that the May 1, 1977 Draft, *supra* note 32, provides in section 1 (b):

> *(b)* "Fault" includes negligence, recklessness, breach of implied warranty, conduct subjecting the actor to strict tort liability, unreasonable assumption of risk, and failure to avoid or mitigate damage. The *fault must have an adequate causal relationship to the damage suffered.*

(emphasis added).

The statement that fault must be causal must be related back to section 2 (b), which states that directness of fault is to be considered as an apportionment factor. The clear inference from section 1 (b) is that causation is an all-or-nothing decision. The inference from section 2 (b) is to the contrary. For reasons set forth in the text, the author favors eliminating cause-in-fact as an all-or-nothing issue, and it is suggested that the last sentence of section 1 (b) be eliminated and the author's modification be substituted.

[87]W. PROSSER, LAW OF TORTS 236, 244 (4th ed. 1971); Owen, *The Highly Blameworthy Manufacturer*, *supra* note 12. *See also* text accompanying notes 44-45 *supra*.

[88]It is interesting to note that the original draft of the Uniform Comparative Fault Act provided in section 1 that:

> In an action for injury to person or property, based on negligence [of any kind], recklessness, [wanton misconduct], strict liability or breach of warranty, or a tort action based on a statute *unless otherwise indicated by statute* any contributory fault on the part of, or attributed to, the claimant, or of any other person whose fault might otherwise have affected the claimant's recovery, does not bar the recovery but diminishes the award of compen-

a fault comparison will be proper because plaintiff has a role to fulfill in maintaining product safety. When causation is seriously at issue, there may be yet another role for comparative fault to play. If mishandled, comparative fault can become an excuse for avoiding important decision-making. In the hands of a creative judiciary, comparative fault can contribute to a system of product liability that is both just in theory and practical in result.

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satory damages proportionately, according to the measure of fault attributed to the claimant. This Section applies whether the contributory fault previously constituted a defense or not, and replaces previous common law and statutory rules concerning the effect of contributory fault, including last clear chance and unreasonable assumption of risk.

(emphasis added). The comment to this proposed statute takes special note of the underlined language. It states:

> Unless otherwise indicated by the statute is to keep from repealing by implication and to give a court the authority to construe a statute such as a child labor act to prevent any mitigation if it thinks the policy of the act requires protection of a class of persons even against their own weaknesses or inadequacies.

The May 1, 1977 Draft, *supra* note 32, eliminates the underlined language. This author has it on the good authority of Professor John Wade that the drafters did not intend by this omission to change the sense of the original draft. Thus, there is recognition that there may be circumstances prescribed by statute where certain classes of plaintiffs need the protection of the law and these persons should be entitled to full rather than partial recovery. It is the thesis of this article that in certain product liability situations comparative fault should not reduce recovery. Thus, the author would suggest restatement of the original language to read as follows:

> Nothing contained in this statute shall prevent a court from refusing to apply the comparative fault principle in any case where a statute indicates otherwise or where in the judgment of the court the application of the comparative fault principle would significantly impair the purpose of the law in assessing liability on a defendant.

Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases

CLIFFORD DAVIS*

I. INTRODUCTION

The multiplication of theories of recovery[1] in product litigation has been accompanied by a multiplication of the number of defendants in almost every product suit as plaintiffs "shotgun," that is, sue everyone connected with the product whether or not those defendants' "fault" contributed to the injury.[2] When the confusion of the law of contribution and indemnity,[3] such as the active-passive distinction,[4] is imposed on the multiple theories of product liability,

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[1]In the literature devoted to product liability the terms explosion, revolution, and even multiplication are used to describe a process perceptively described by Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970) as a revolution that is part of a much larger phenomenon where risks have been reversed between active and passive parties. Under Professor Gilmore's analysis what is called a multiplication of theories in products liability can more accurately be described as a use of the division of civil obligations into the fields of tort and contract to resort to torts when there are roadblocks in the contract doctrines and to come back to contract when tort doctrines block the realignment of liabilities to meet changes in the society that the law reflects.

For the purposes of this Article the characterization of products liability as tort or contract is obviated by an assumption that products liability cases fall into four functional classifications: cases in which (1) a product was represented or warranted and did not live up to the promises; (2) a product was defectively manufactured; (3) a product was defectively designed; ;or (4) there were inadequate or defective warnings. And, to make the following discussion free of discussion of whether products liability is tort or contract, it is assumed that all four functional classifications can be characterized as cases of "fault."

This does not mean that shifting back and forth between contract and tort is meaningless. It simply means that cases in which such problems have sharp significance, such as where a product damages itself, *e.g.*, Jig, The Third Corp. v. Puritan Marine Ins. Und. Corp., 519 F.2d 171 (5th Cir. 1975), are explored elsewhere, in articles such as Wade, *Is Subsection 402A of the Second Restatement of Torts Preempted by the U.C.C. and therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

[2]Just as the color red may be "defined" by pointing to a stop light, the term "shotgunning" might best be understood by looking at the paradigm cases described in the text accompanying notes 22-35 *infra*.

[3]The confused history of contribution and indemnity and its literature is explored in a later section of this Article. See notes 76-86 *infra* and accompanying text.

[4]When contributory negligence barred a plaintiff from recovery against a negligent defendant it was logical to hold as a corollary that a negligent defendant sued by an injured plaintiff could not cross claim over against a codefendant tortfeasor

the rights of the defendants among themselves seem beyond rational resolution. Yet litigation does come to a close, generally by settlement.

The major premise on which the following discussion is built is that settlements are, or at least have been and should be, effected by distributing costs in proportion to fault.[5] As courts and legislatures in over one-half the states have moved toward adoption of the distributive principle in trials the focus has generally been on comparative negligence (where the fault of the plaintiff is compared with that of all defendants) rather than on comparative contribution (where the degrees of fault of each defendant are compared to determine the share each should pay). Using the terms comparative negligence and comparative contribution invites a distinction between those concepts, and suggests that courts or legislatures can adopt one and not the other. If both are seen as logical deductions from the distribution principle, then the adoption of either comparative negligence or comparative contribution requires that the other be adopted. Unfortunately, little attention has been given to how the distribution principle can be preserved in settlements.[6]

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for contribution. It perhaps illustrates Professor Gilmore's suggestion discussed in note 1 *supra*—that there is a larger phenomenon shifting responsibility to active parties from passive ones—that, even when there was a rule of no contribution between tortfeasors, the courts would allow a passive tortfeasor to recover indemnity from an active tortfeasor. This mitigation of the harsh and unjust effect of the no contribution rule, however, seems to have done a poor job. Efforts to apply the distinction were confused, and it has been observed that "as applied by a court or jury, the 'active'—'passive' test usually becomes a search for the more reprehensible, better insured, or more solvent defendant." Comment, *Contribution in Collision Cases*, 68 YALE L.J. 964, 977-78 (1959). As will be seen in the discussion of *Dole v. Dow Chemical Co.* in notes 10 and 11 *infra*, the use of percentages of fault allowed courts to abandon the unsatisfactory all-or-nothing rule of indemnity based on the active-passive distinction and sweep the problem of when to give "indemnity" into the distribution of costs according to findings of degrees of fault.

[5]One of the clearest statements of the distribution principle is found in Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962), in which the court established "pure" contribution between concurrent tortfeasors and brought the gross negligence of the automobile guest case within the comparative negligence approach. The court said: "[W]e are stressing the basic goal of the law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it." *Id.* at 10, 114 N.E.2d at 113. For a fuller discussion, see Davis, *Third-Party Tortfeasors' Rights Where Compensation Covered Employers Are Negligent—Where Do Dole and Sunspan Lead?*, 4 HOFSTRA L. REV. 571 (1976) [hereinafter cited as Davis, *Third-Party Tortfeasors' Rights*].

[6]The indispensable writings on the subject of settlements by one of the multiple parties under comparative negligence are Fisher, Nugent, & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655 (1974); Raskoff, *Comparative Negligence in California: Multiple Party Litigation*, 7 PAC. L.J. 770 (1976); Thode, *Comparative Negligence, Contribution Among Tort-Feasors, and the Ef-*

Even the Uniform Comparative Fault Act, as now proposed,[7] would sacrifice distribution in settlements as it moves to make comparative fault logically consistent in trials. A minor premise is that workers' compensation statutes are settlements between employers and employees for fault within the compensation system.[8] Where plaintiffs have settled with one or more actors, either directly or under a compensation statute, an argument will be made that equal protection as well as the distribution principle requires both types of settlements to be treated similarly, with a pro-rata distribution according to degrees of fault.

It will be suggested that the distinction between comparative negligence and comparative contribution should serve primarily as a description of alternate routes to the recognition of the distribution principle. This will be illustrated by what has happened in New York and what should happen in Connecticut. And the major premise will be applied to various forms of currently used settlement arrangements, such as the loan receipt and covenants not to sue. Questions will be raised about the right of a plaintiff at fault (and of a defendant subrogated to a plaintiff's rights under a loan receipt) to use the doctrine of joint and several liability to make the defendant(s) left in a suit after settlement with another pay for proportions of damages that exceed their proportionate degree of fault.[9] Here the major and minor premise interact to ask why the costs of fault within the compensation system should be passed out to third

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fect of a Release—A Triple Play by the Utah Legislature, 1973 UTAH L. REV. 406; and Berg, *Comparative Contribution and Its Alternatives: The Equitable Distribution of Accident Losses*, 1976 INS. COUNS. J. 577.

[7]The proposed draft of the Uniform Comparative Fault Act contained in Wade, *A Uniform Comparative Fault Act—What Should it Contain?*, 10 U. MICH. J. L. REF. 220 (1977) is the draft discussed in this article. Although section 5 of the draft set out in Professor Wade's article proposed that a release given in good faith bars suits against the person to whom it was given and allows the remaining defendants only a pro tanto reduction in any recovery against them, the National Conference of Commissioners on Uniform State Laws in their August 1977 meeting adopted the pro rata approach. The final draft allows a non-settling defendant in a case in which a party has settled to reduce any recovery by the percentage of negligence of the settling party.

[8]This minor premise is fully stated in Davis, *Third-Party Tortfeasors' Rights*, *supra* note 5, and is based on N.Y. Central R.R. v. White, 243 U.S. 188 (1917), which upheld the compensation scheme against constitutional attack saying the tradeoff of no fault liability of employers under compensation for their common law tort liability was a basis for upholding such statutes.

[9]*See* note 71 *infra* and the related text, in which the question is asked whether the doctrine of joint and several liability among tortfeasors should not be abandoned under comparative negligence when the plaintiff is at fault as well as the defendants. The leading case is American Motorcycle Ass'n v. Superior Court, 65 Cal. App.3d 694, 135 Cal. Rptr. 497 (1977).

party tortfeasors, and it will be suggested that equal protection arguments may offer courts a way to rationalize incomplete comparative negligence systems.

II. Comparative Negligence and Comparative Contribution as Alternate Routes to the Distribution Principle: Legislative vs. Judicial Change

Dole v. Dow Chemical Co.,[10] perhaps the leading New York case of this decade, can, I believe, fairly be characterized as a landmark case on comparative contribution. The principal significance of *Dole* is that it swept away the active-passive distinction and made indemnity and contribution a simple comparison of fault.[11] Decided when a plaintiff's contributory negligence was still a bar to recovery, *Dole* was followed by legislative adoption of comparative negligence for the two-party suit.[12]

In Connecticut, on the other hand, comparative negligence between plaintiffs and defendants has been legislated,[13] but the legislature did not speak on whether the rule of no contribution among tortfeasors should be changed.[14] One Connecticut lower court has declined to extend the distribution principle and apply it among defendants,[15] while another Connecticut lower court opinion says once a plaintiff at fault can recover from others at fault, it is no longer logical to say a defendant at fault cannot recover contribution from another defendant also at fault.[16] When and if comparative contribution comes to Connecticut, the full application of the distribution principle will have been reached by a different route from that of New York.

Although a majority of states now have comparative negligence, the most by statutes[17] and some like California by judicial action,[18] states like Indiana and Illinois—which have neither comparative

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[10]30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See* note 43 *infra* and related text for a full statement of this case.

[11]Phillips, *Contribution And Indemnity In Products Liability*, 42 Tenn. L. Rev. 85 (1974), describes this signal achievement of *Dole* and places it in perspective.

[12]N.Y. Civ. Prac. Law § 1411 (McKinney 1976).

[13]Conn. Gen. Stat. Rev. § 52-572h (1977), *discussed in* James, *Connecticut's Comparative Negligence Statute: An Analysis Of Some Problems*, 6 Conn. L. Rev. 207 (1974).

[14]*Id.*

[15]Smith v. Boccuzzi, 33 Conn. Supp. 187, 369 A.2d 635 (1976).

[16]Hays v. Hazard, 3 Conn. L. Tribune No. 14.

[17]*See* Heft & Heft, note 52 *infra*.

[18]Comparative negligence was adopted judicially in California in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

negligence nor contribution—may want to consider these routes to change. As Illinois has "flirted" with the adoption of comparative negligence,[19] but ultimately left the problem for legislative action,[20] and a federal court in Indiana has required contribution,[21] the Connecticut experience to date should be described to illustrate how much less satisfactory some legislative solutions are than judicial ones. This seems particularly true because comparative fault statutes generally fail to deal with settlements; thus even though costs are distributed in proportion to fault at trials, when one defendant settles the remaining defendant(s) gets only the benefit of a right to offset that settlement, not a pro-rata reduction.

Now that routes of change have been described, it is necessary to describe various forms of settlements and trace the effects of these settlement arrangements on the policy of encouraging settlements while seeking to distribute costs.

III. A Paradigmatic (Side by Side) Display of Settlement Arrangements

In the hope that later discussion will be easier to follow if a few relatively complex settlement cases can be referred to in the discussion by name rather than a recitation of their facts or even their holdings, consider the following cases. Note in each not only whether the state had either or both of the emerging rules of comparative negligence and comparative contribution but whether the plaintiff was an employee plaintiff, and thus entitled to receive compensation benefits, or was a consumer plaintiff and had no compensation benefits. Note also whether any or all of the multiple defendants had settled with the plaintiff.

1. Payne v. Bilco Co.[22]—from Wisconsin, a comparative negligence state with comparative contribution.

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[19]The "flirting" with comparative negligence in Illinois is the subject of a Symposium with articles by leading torts scholars entitled, *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 Vand. L. Rev. 891 (1968), where James, Kalven, Keeton, Leflar, Malone and Wade discuss *Maki v. Frelk.*

[20]Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

[21]Kohr v. Allegheny Airlines, 504 F.2d 400 (7th Cir. 1974) rejected Indiana's no contribution rule for air collision cases.

[22]54 Wis. 2d 345, 195 N.W.2d 641 (1972). The working out of the distribution in settlements can be seen in other cases. In Laster v. Gottschalk, 255 N.W.2d 210 (Mich. Ct. App. 1977), one of two defendants in an automobile case paid for a pro rata release without admitting liability. The remaining defendant successfully kept the settling defendant in for the apportionment of fault. The dissenting opinion, perhaps correctly, points out the real reason to keep the settling defendant in. "In order for a pro rata share to be found then there must be at least two culpable parties." The dissent then

Plaintiff, injured when a door hit his arm on his employer's premises, received compensation from the employer (Blackhawk), sued the manufacturer of the doors (Bilco), and the contractor that built the building (Permanent Construction Company). Bilco cross-complained against Permanent and impleaded the architect who designed the doors for the owner (Sommerville), the subcontractor that installed the doors (Skobis), and the manufacturer's representative for Bilco (J. M. Mitchell Products).

The plaintiff settled with Permanent, Sommerville and Skobis for $6,000. At trial the special verdict apportioned the fault as follows:

40%	to Sommerville, the architect
10%	to Permanent, the contractor
15%	to Skobis, the subcontractor
0	to Bilco, the door manufacturer
0	to Mitchell, the manufacturer's rep.
20%	to Payne, the plaintiff
15%	to Blackhawk, the compensation covered employer
100%	

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argues that as the settlement was arrived at before the verdict there could be no determination of pro rata shares, and suggests that the way to let the jury know of possible fault of the settling party is to subpoena that defendant and get his testimony.

Although the majority opinion does not exploit this inconsistency in the dissent, it does arrive at the same result as *Payne v. Bilco* when it says that on the trial with the settling party in: (1) if the jury finds the settling defendant solely liable the remaining defendant will be discharged; (2) if the remaining defendant is solely liable that defendant will be entitled to a pro tanto reduction; but (3) if the jury finds both liable the non-settling defendant will be responsible for only its share and the settling defendant's share will be satisfied by the settlement.

Letting the jury find out about the settling defendant's fault, if any, under a subpoena, the solution suggested by the dissent, would not allow the determination of shares if that defendant was not a party. Because the release did not admit liability, the court said it could not be introduced. Keeping the settling party in was the only practical way to achieve a pro-rata distribution.

Other cases include Leger v. Drilling Well Control, Inc., 69 F.R.D. 358 (W.D. La. 1976) and Fruge v. Damson Drilling Co., 423 F. Supp. 1276 (W.D. La. 1976), where the working out of the distribution rule in maritime torts was deemed to require that when one defendant settled the remaining defendant could be held responsible only for its pro rata share. The *Fruge* opinion says this will require a detailed and complex determination by the jury of the degrees of fault of all—the defendants who have settled as well as those who have not—and questions whether the complexities and expenditure of judicial time can be justified by the benefits that would stem from achieving a true pro rata distribution according to degrees of fault. This may well be true in *Fruge* where the working out of pro rata effect saved the defendant only $1,200. However, the principle may have greater impact in other cases.

Because Sommerville, Permanent, and Skobis had settled with the plaintiff, and Blackhawk was covered under compensation, judgment was entered against Payne on Bilco's motion.

To the plaintiff's objections that it was error to include the employer and the settling defendants the court concluded failure to do so would have been "prejudicial" to Bilco and that "it was necessary that all the alleged tortfeasors be included in the special verdict for comparison purposes."[23]

2. Castillo Vda Perdomo v. Roger Construction Co.[24]—from Pennsylvania, a contribution state with "joint tortfeasor" releases—*i.e.*, releases that operate to release other defendants to the extent of pro-rata share of common liability of person released.

Five people died as a result of inhalation of carbon monoxide fumes emitted from a propane gas generator that did not cut off when normal power service was resumed and was not adequately vented. The administrators of their estates sued the Friedman interests (that is, the owners of the apartment, and the principal contractors) and the electric contractor (Bohem), the heating contractor (D'Anjollel), the contractor that graded the site and may have obstructed the exhaust (Main Line Contractors), the manufacturer of the switch (Zenith Automatic Controls), the suppliers of the switch and generator (Maris Equipment and Rose Electric), and the manufacturer of the generator was added (Kohler Company).

The Friedman interests paid $500,000 for a joint tortfeasor or pro-rata release; the other defendants then settled as follows:

Zenith	$100,000
Main Line	20,000
Rose Electric	5,000
Maris Equipment	5,000
Kohler	27,500
D'Anjollel	20,000
Bohem	82,500
	$260,000

Having paid $500,000 of the total of $760,000, the Friedman interests asked for contribution from the other defendants who settled for what seemed far less than their "pro-rata" share. Contribu-

[23]54 Wis. 2d at 345, 195 N.W.2d at 646.

[24]418 F. Supp. 529 (E.D. Pa. 1976), *rev'd and remanded*, 560 F.2d 1146 (3d Cir. 1977), in an opinion which stresses the distribution principle. The opinion also states that the primary purpose in settlements is to get money in the hands of the victim and the secondary reason is to reduce the burdens on courts. This opinion offers the view that all parties must settle together.

tion was denied. This opinion appears to be a case of first impression denying to a tortfeasor who settled a right to contribution from those who settled thereafter.[25]

Like *Payne v. Bilco*, *Castillo* has a discussion of the mechanics of settlements, and language that indicates that courts should follow the practice of attorneys who settle by allowing the costs to be distributed among the defendants in proportion to perceived relative degrees of fault.[26]

3. Reese v. Chicago, Burlington & Quincy R.R.[27]—from Illinois, a no contribution state.

A railroad employee supervising a crew loading with a crane manufactured by Koehring was killed when a brake pedal "jumped off the floor." Suit was brought against the railroad under the Federal Employees Liability Act and against Koehring under product theories. The railroad got a loan receipt from the plaintiff, paying $57,500 secured by rights against Koehring. Only if the plaintiff recovered more than $57,500 from Koehring could she keep the excess.[28]

The suit proceeded against Koehring and not the railroad despite evidence of the railroad's improper maintenance of the crane. The jury verdict was $149,000. The trial court set off the railroad's payment. The appellate court reversed, holding that a loan receipt agreement is enforceable according to its terms.

For the sake of completeness, even though *Reese* involved a payment to the plaintiff by the railroad, if a state approves "loan receipts" and allows one tortfeasor to shift all the loss to a co-tortfeasor, some courts have gone on and used "Mary Carter" settlements. A Mary Carter does not provide a cash "loan" but merely limits liability and provides for extinguishment of that agreed liability to the extent of recovery against co-tortfeasors.[29]

It is easy to understand how loan receipts came to be used in states which barred contribution between tortfeasors. In the typical case involving multiple defendants, one of those defendants with an insurance policy with low limits will rush to the plaintiff and settle for the policy limit, providing that the plaintiff will use every effort to recover more from the defendants that have high limits or happen to be very solvent. Faced with a defendant with limited resources to offer, and who offers all, a plaintiff might well take the

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[25]*Id.*

[26]*Id.*

[27]55 Ill. 2d 356, 303 N.E.2d 382 (1973).

[28]*See* the excellent Annotation at 62 A.L.R.3d 1111 (1975).

[29]Mary Carters are the subject of an Annotation at 65 A.L.R.3d 602 (1975) and the Comment, 25 FLA. L. REV. 762 (1973).

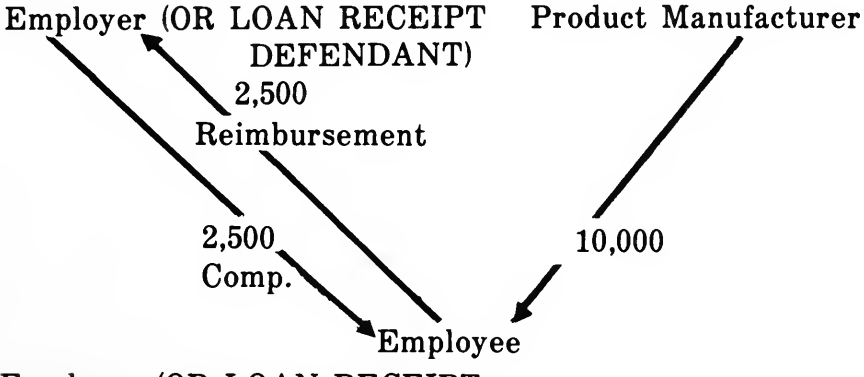
money offered and agree to allow that defendant to be subrogated to the plaintiff's rights against third parties to the extent of the payment. For compensation-covered employers, most statutes provide this remedy for the employer[30] when it gives the injured employees the benefits of the compensation statute.

4. Compensation Analogies

a. *Iowa Power & Light Co. v. Abild Construction Co.*[31]—from Iowa, a contribution state.

IN *IPALCO*, an employee was injured when an iron bar he was holding came into contact with a power line. The power company settled for $177,090.79 and sought to recover from the plaintiff's compensation-covered employer all or half of the settlement by indemnity or contribution. Unlike the *Dole v. Dow* court, the Iowa court, as have a majority of courts in this country, held that the full responsibility for the employee's injuries could be cast upon the third party defendant power company despite employer fault.

To show the effect of the loan receipt and its analogy to *IPALCO* in diagrammatic form, assume that the compensation, or loan receipt amount, is $2,500; assume the common law damages recoverable by the plaintiff are $10,000. Under *IPALCO* and under a loan receipt the effect would be:



Employer (OR LOAN RECEIPT DEFENDANT) Pays	-0-
Product Manufacturer Pays	10,000
Employee Gets	10,000

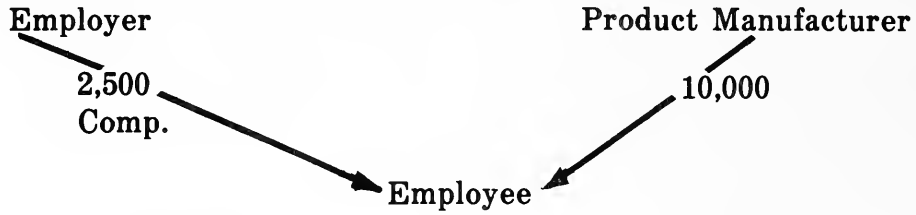
With the reimbursement or subrogation features of compensation and loan receipts the compensation carrier, and the defendant that takes a loan receipt, can push all the costs onto a remaining defendant.

For completeness, consider also the analogy of the settling

[30]*See* Davis, *Third-Party Tortfeasors' Rights*, *supra* note 5.

[31]259 Iowa 314, 144 N.W.2d 303 (1966).

defendant who takes a covenant not to sue with the compensation carrier, or employer, that does not have subrogation or reimbursement rights. The use of *IPALCO* in a state, such as Ohio,[32] which does not have reimbursement rights can be diagrammed as follows:

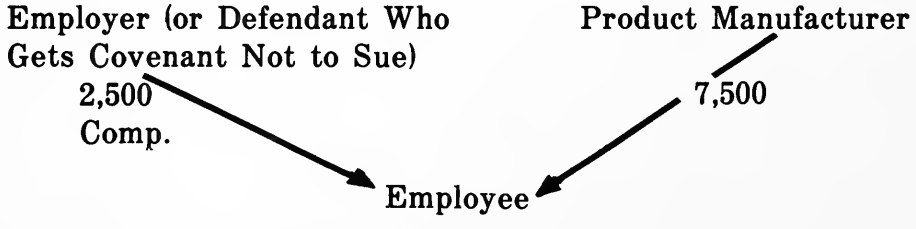


Employer Pays	2,500
Product Manufacturer Pays	10,000
Employee Gets	12,500

Where a defendant settles for $2,500, and the plaintiff covenants not to sue that defendant, the usual result would be analogous to what can be called, in compensation, "load sharing." This is shown in:

b. *Santisteven v. Dow Chemical Co.*[33] In *Santisteven*, again a product liability defendant sued on a defective warning theory by an injured employee was denied the right to sue the employer for contribution. The *Santisteven* court, however, recognized the inequity of casting the whole burden on Dow Chemical and noted that the recovery against Dow would be reduced by the amount of compensation benefits, thus effecting a "load sharing."

Santisteven:



Employer Pays	2,500
Product Manufacturer Pays	7,500
Employee Gets	10,000

The diagram for *Santisteven* shows what happens when a defendant pays for a covenant not to sue and the plaintiff proceeds to

[32]OHIO REV. CODE ANN. § 4123.74 (1973).

[33]506 F.2d 1216 (9th Cir. 1974).

judgment against a remaining defendant. Even in a no contribution state the amount received in the settlement will be deducted from the amount of the jury verdict.[34]

The foregoing discussion has not treated "releases" because some states still hold that a release of one joint tortfeasor releases all.[35] Therefore our building blocks are "pro rata" or Pennsylvania joint tortfeasor releases, covenants not to sue, and loan receipts. These and their compensation analogies are:

1. Loan receipts and *IPALCO;*
2. Covenants not to sue and *Santisteven;*
3. Pro-rata releases of the settling party's proportionate degree of fault and *Payne v. Bilco.*

These are the basic patterns for settlements. It should not be forgotten that variations exist, such as the practice of paying some money to a plaintiff while the suit is pending, without asking for anything but a credit against whatever is ultimately recovered. This practice does not involve a true release or settlement, so it is not treated here. It will be relevant when asking what the jury should know.[36] It is obvious that if such payments are known to the jury, that may affect their verdict.

IV. A Theory of Settlements

A. Tests

With the spread of comparative negligence and comparative contribution the Wisconsin case of *Payne v. Bilco* is the paradigm for the future, in the sense that it is the model or ideal. The court in *Payne v. Bilco* distributed responsibility among multiple defendants in proportion to their respective degrees of fault. It approved the submission of the degrees of fault of actors who have either settled by taking a pro rata release for their own degree of fault or settled under compensation. The opinion points out that such a distribution of costs in proportion to degrees of fault is the way parties settle, and it is the way the court allowed the litigation to be closed.

This is a model for the future in that each defendant before the court has either settled for a proportionate degree of fault or will suffer a judgment for that degree of fault. However, no defendant has paid or can be made to pay for more than that defendant's proportionate part.

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[34]Dwy v. Connecticut Co., 89 Conn. 74, 92 A. 883 (1915).

[35]Annot., 73 A.L.R.2d 403 (1960).

[36]*See* Taylor v. Yellow Cab Co., 548 S.W.2d 528 (Mo. 1977). This case involves the admissibility of evidence of advanced payments predicated on possible tort liability and holds that such evidence shall not be admitted before the jury although there can be a credit against the plaintiff's ultimate recovery.

It is a model under the principle of *distribution.* Any scheme of settlements that fails to distribute costs in proportion to perceived fault will fail a threshold test, which can be stated as a question: Does the settlement scheme distribute costs in proportion to fault? Settlement schemes which flunk this test, such as loan receipts and Mary Carters, violate the distribution principle. With the working out of the distribution principle, those practices will be rejected.[37] As will be seen, it can be argued that the offset approach can satisfy this threshold test in a rough fashion. Therefore, the later discussion will compare the dollar offset in settlements with pro rata releases, and little or no attention will be given to loan receipts or Mary Carters.

Payne v. Bilco did not adjudicate the rights of the defendants among themselves or suggest motivational tests for a scheme of settlements; therefore it is necessary to look to *Castillo* where a defendant (or group) had settled, paying approximately two-thirds of the total the plaintiff received from all defendants in settlement, and sought contribution. The defendants that paid $500,000 argued that allowing them to recover contribution from the remaining defendants that settled for $260,000 would "encourage all parties to settle at the same time."[38]

Firmly committed to a policy of encouraging settlements, the court set out three principal motivations for settlement: "(1) to avoid the risk of payment of a potentially larger sum in damages if they are found liable; (2) to eliminate the expense of further proceedings, including trial; and (3) to avoid the possibility of a *formal,* adverse judicial determination such as a finding of fault."[39]

In attempting to set out and test schemes of settlement, these can be rephrased as questions and called motivational tests. The *Castillo* opinion suggests these are stated in descending order of importance. It should be generally agreed that limiting expenses is more important than the other two tests; however, a product manufacturer may well put the final above the penultimate one because of the potentially destructive impact of an adverse finding in one case upon future cases.

Although *Castillo* involved a defendant that settled first and then sought contribution from defendants that settled later, the policy reasons for holding that the former could not recover contribution apply with equal force to a defendant that settles later, or suffers a large judgment, and sues those who settled first seeking

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[37]Other objections to the loan receipt are discussed in Annot., 62 A.L.R.3d 1111 (1975).

[38]418 F. Supp. at 535.

[39]*Id.*

contribution. At the heart of the matter is the court's discussion of the idea that allowing contribution on these facts will encourage all parties to settle at once rather than one at a time. To this argument the court says: "In our experience, however, things just do not happen that way, in the real world. It is always much less likely that three or more parties will come to a meeting of the minds than two will."[40]

This conclusion in *Castillo* can be read as stating a procedural requirement for settlement practice, which can be added to the three motivations enumerated by the court to test the desirability of various settlement schemes. Any workable scheme of settlements must permit one defendant to settle if that defendant and the plaintiff can agree even though other defendants refuse to join. This goal, or test, can be met in product suits only if indemnity implied at law is swept into a comparison of degrees of fault as the New York court has done in *Dole v. Dow.*[41]

Finally, the *Castillo* opinion discusses the need for "benefits"[42] to the party from whom contribution is sought. Where pro rata releases are used benefits cannot appear. If a reluctant defendant "holds out" when others are settling, especially if they get pro rata releases, the fact the holdout pays far more to settle a given percentage of fault still does not benefit the defendant that settled earlier for fewer dollars for the same percentage of fault.

With covenants not to sue, a holdout defendant enjoys a dollar offset. A holdout that does not settle cannot confer a true benefit on the defendant that did obtain a covenant not to sue. But if enough was paid for a covenant from a defendant anxious to settle, a benefit might be conferred on a subsequent holdout. Thus, a further test of settlement schemes is: Can the scheme result in one defendant benefiting from what another pays?

Pro rata settlements pass this test while the covenant and offset scheme may occasionally fail because it is not distributional. Before attempting to compare the offset and pro rata approaches further, and test them further under the six stated principles, it is appropriate to trace briefly the history of both pro rata releases and the offset approach. In doing this a full description of each can be made, using New York as the distributional model and the proposed Uniform Comparative Fault Act as the dollar offset model.

B. New York—The Working Out of the Distribution Principle

Dole v. Dow Chemical Co.[43] is the leading New York case which

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[40] *Id.* at 536.

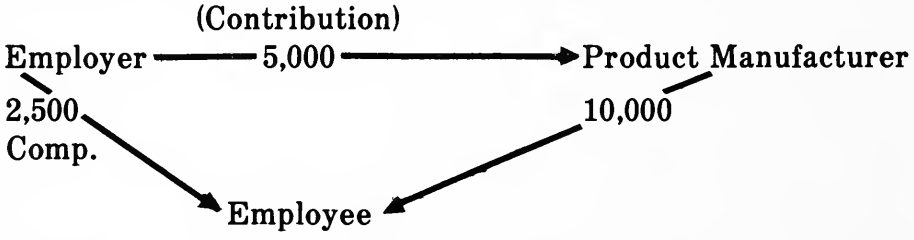
[41] *See* the discussion in note 11 *supra* and accompanying text.

[42] 418 F. Supp. at 537.

[43] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

knocks down the compensation arrangement that allowed an employer at fault to pass all responsibility out to another. Like the Iowa case that said loan receipts must fall as a violation of that state's contribution principles,[44] *Dole v. Dow* can be read as saying that an employer's compensation immunity under the statute must fall because it violates comparative contribution. To diagram *Dole v. Dow* as earlier cases were diagrammed, that is, assuming compensation responsibility of $2,500 and common law damages of $10,000, and that the employer and Dow were each 50% at fault, then this leading case can be described as follows: The New York Court of Appeals allowed Dow Chemical—a product liability defendant sued on a defective warning theory by the widow of a deceased employee of the Urban Manufacturing Company—to sue Urban for contribution despite the argument that the compensation act gave the employer immunity.

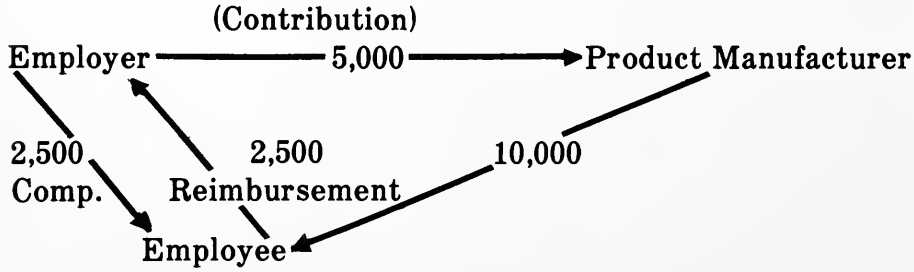
(A) A *Dole* approach in a state which does not give the employer subrogation or reimbursement rights:



The result (disregarding the cost of shifting):

Employer Pays	7,500
Product Manufacturer Pays	5,000
Employee Gets	12,500

(B) A *Dole* approach where the employer has subrogation or reimbursement rights:



Employer Pays	5,000
Product Manufacturer Pays	5,000
Employee Gets	10,000

[44]Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Iowa 1953).

Parties in other states wishing to attack *IPALCO* and urge the adoption of a principle of distribution should consider whether their facts are as appealing as those in *Dole*. Someone working for the employer probably had removed Dow's warning. To follow *IPALCO* and permit the plaintiff to recover one hundred percent common law damages from Dow would be malapportioned justice. It was especially malapportioned when the employer under *IPALCO* would be entitled to subrogation. In other cases it has been held that where a defendant interferes with a codefendant manufacturer's warnings, the manufacturer escapes all the responsibility.[45] Yet *IPALCO* would put all the losses on the manufacturer. Perhaps the ultimate reason for *Dole* was that the New York Court of Appeals could not accept this form of malapportioned justice. This is supported by that part of the opinion which expressly states the case should be governed by a principle of distribution.[46] To examine this working out of the distribution principle of *Dole* consider what followed *Dole* in New York, especially the provision for settlements.

C. Pro Rata Releases

After *Dole*, New York adopted comparative negligence in the two-party suit,[47] extending the principle that costs should be shared among parties in proportion to their respective degrees of fault to include the plaintiff. For the New York lawyer, the legislature also gave guidance on how the principle of sharing costs in proportion to respective degrees of fault would be applied when one of many defendants settled with the plaintiff. Section 15-108 of the New York General Obligations Law provides:

> (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in-

[45]Magee v. Wyeth Labs, Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963); Harper v. Remington Arms Co., 156 Misc. 53, 280 N.Y.S. 862 (Sup.Ct. 1935).

[46]See that part of Dole v. Dow Chemical Co., 30 N.Y.2d 142, 150; 282 N.E.2d 288, 293; 331 N.Y.S.2d 382, 389 (1972), which quotes Werner, *Contribution and Indemnity*, 57 CAL. L. REV. 490, 516 (1969), to state: "tort policy goals" include an "equitable loss sharing by all the wrongdoers" in multiple party cases.

[47]*See* note 12 *supra*.

> the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.[48]

The pro rata approach has been criticized as a deterrent to settlements, and it has been argued that no plaintiff's lawyer can settle with a defendant and go to trial against the other defendants because if, after the ultimate judgment (and determination of the settling defendant's percentage of fault), the plaintiff receives less than the total indicated by the verdict the client will be unsatisfied.[49]

Certainly from the plaintiff's viewpoint it would be desirable to be able to settle with one defendant and have to offset against the verdict recovered from other defendants only the actual sum received—especially if that defendant was underinsured—and not have to reduce the judgment by the percentage of fault attributable to the settling defendant. That would put great pressure on the defendant who refused to join in a settlement by a codefendant. However, if the defendant who refuses to settle can file a cross action against a defendant that has settled (a right cut off by the New York General Obligations Law) the defendant that has settled has gained nothing by paying for a settlement, and will have provided financing for the plaintiff's suit, which can boomerang when the suit for contribution or indemnity is prosecuted, as it did in *Dole* and continues to do in the employee-plaintiff cases.[50] And, if the defendant that does not settle cannot sue for contribution or sharing of the costs in excess of what the plaintiff accepted from the defendant that settled, but still must pay for more than the proportionate share of damages fixed by the jury in determining the percentages of fault, the principle of sharing costs in proportion to degree of fault suffers. It can be said that joint and several liability is used to

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[48]N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1976).

[49]Wilner & Farrell, *Dole v. Dow Chemical Co.: The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457, 465 (1976).

[50]Examples of *Dole's* application to pierce the compensation-covered employer's limitation of liability to the compensation settlement are legion, but a recent case, Nelson v. Dykes Lumber Co., 52 App. Div. 2d 808, 383 N.Y.S.2d 335 (1976), deserves special attention for what it hints at in the apprortioning of responsibility in many close cases. The case involved a compensation-covered employer that had its hoist protectively screened by a third party. An employee who was injured when a brick came through the screen sued the third party. The screen contractor then sued over against the employer and the jury split the responsibility 50-50! It is interesting that the United States Supreme Court abandoned the divided damages rule when it decided United States v. Reliable Transfer Co., 421 U.S. 397 (1975), but that juries that have difficulty in apprortioning damages may come back to the 50-50 split.

provide coverage for underinsured defendants.[51] However, to state that points out a practical objection to a scheme which holds the defendant that doesn't settle is responsible for all damages, offsetting only what was received in the settlements. A local defendant guilty of a substantial degree of fault can buy out early in a sweetheart settlement, or for low policy limits in the case of underinsured defendants. This would let foreign defendants or fully insured defendants pay the plaintiff all the damages in excess of what the plaintiff accepted from the settling defendant even if the degree of fault attributable to these defendants was small in comparison to that of the defendant that settled.

The Wisconsin experience[52] suggests that lawyers who are familiar with the theories of products liability and who have experience with comparative fault can work out settlements that satisfy their clients. As the plaintiff's lawyer tries to explain a settlement that releases the settling defendant's percentage of fault to the client, the obvious analogy is the landowner who has given an oil and gas lease where the lessee is about to drill and wants to buy some of the landowner's royalty. If the landowner sells some and keeps some, there will be some cash even if the well is dry, although less if the well is a producer. The client who settles gets some cash even if the well is dry, so that offsets getting a little less than the full amount if the suit is successful.

D. Settlements in the Proposed Uniform Comparative Fault Act

New York is not the only model for handling settlements under the distribution principle. The proposed Uniform Comparative Fault Act[53] in attempting to make comparative fault consistent, has chosen the offset approach. When one defendant settles, the plaintiff's recovery against the remaining defendant(s) is reduced by the amount received in or stipulated in the settlement.[54] Giving credit to the remaining defendants only for the amount received, or stipulated in a settlement, is contrary to a principle that the costs of injury be distributed in proportion to fault. Thus in the application of the distribution principle, the New York solution is clearly preferable to the proposed Uniform Act because it, like Wisconsin and

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[51]The view that joint and several liability provides insurance coverage for uninsured defendants that might better be the result of legislative choice rather than judicial inertia can be found in James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 6 CONN. L. REV. 207 (1974).

[52]*See* C. HEFT & C. HEFT, COMPARATIVE NEGLIGENCE MANUAL §§ 4.200-.220 (1971), which argues that approtioning damages makes settlements easier and describes the working out of the implications of apportionment.

[53]Wade, *supra* note 7.

[54]*Id.*

Pennsylvania, requires the plaintiff to release the pro rata proportion of fault of the party that obtains a settlement and does not shift to the remaining defendant(s) responsibility for the degree of fault of the settling defendant.

The solution of the proposed Uniform Comparative Fault Act is grounded in the past in the Uniform Contribution Act which was adopted prior to the spread of comparative negligence. It needs to be rethought in light of the adoption of comparative negligence and comparative contribution. Such a rethinking is required, if for no other reason, because on the face of the proposed Act there is an obvious inconsistency. Further, the goal of encouraging settlements by letting a settling defendant be dropped from the trial, which might be thought to be served by the dollar offset provisions of the proposed Uniform Act, should be considered in light of the practical consequences that flow from use of the dollar offset, especially the risk of "sweetheart" settlements, and the question should be asked whether the Uniform Act, in order to encourage settlements by dropping the defendant that settles, pays too high a price in terms of the other tests for settlements.

The inconsistency in the proposed Act which shows a failure to consider the settlement provision in relation to distribution of costs in proportion to fault is that settlements before judgment reduce the remaining defendant's responsibility by a dollar offset,[55] not by a percentage. However, after judgment has been entered and a plaintiff finds that one defendant is underinsured, the proposed Act redistributes that uncollectable part of the underinsured defendant's responsibility among the remaining parties, plaintiff and defendants, in proportion to their respective degrees of fault![56] Thus the proposed Act encourages plaintiffs to accept the policy limits of underinsured, or asset poor, defendants before judgment because the failure to settle with such a defendant before judgment will require a sharing of the uncollectible portion of fault of an underinsured defendant by a plaintiff found to be at fault in even a slight degree.

E. Using a "Good Faith" Standard in the Uniform Act To Deny Contribution (and Indemnity) from a Defendant that Settles

One way in which the Uniform Comparative Fault Act could be amended to avoid "sweetheart" settlements with one defendant while the plaintiff's suit continues against others is to test such set-

[55] *Id.*

[56] The position taken by the proposed act is that suggested in Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289, 297. For a further working out of the implications of sharing, see discussion of *American Motorcycle* in note 71 *infra*.

tlements by a standard of "good faith." If the settlement is not made in good faith that defendant may be required to contribute to the payment of any ultimate recovery. Such a provision is found in section 15-108 of the New York General Obligation Law[57] where such protection seems unnecessary for the defendant that refuses to settle because that defendant's responsibility is limited. A reason for providing that a defendant that has settled may be required to contribute if the settlement was in "bad faith" might be that, with joint and several liability, a defendant that does not settle may suffer a judgment for percentages of fault that exceed the percentage of fault found by the jury. Thus a test of good faith may have to inquire whether a defendant that gets a release of its own share of fault should have expected to have to share responsibility for a share of fault attributable to another defendant that may be bankrupt if the matter goes to trial.

There is a history of the use of good and bad faith tests in contribution suits. Some cases suggest that when one defendant settles, the bad faith of a defendant that refuses to settle can bar the latter's suit for contribution from the defendant that settled.[58] There is a certain logical reciprocity in arguing that if a defendant who refuses to settle in bad faith cannot recover contribution when, after judgment, that defendant pays a disproportionate share of the costs, then it logically follows that if a defendant settles in good faith other defendants that refuse to settle are impliedly not acting in good faith.

However, practice experience, for which I cannot cite reported cases, teaches me that the relation of verdicts and settlements is often tenuous at best. That is, cases that could be settled for $15,000 or less often end with jury verdicts that exceed $150,000. Cases involving an insurer's negligent failure to settle within the insured's policy limits[59] suggest that virtually any figure in a settlement can be a good faith figure, but such cases have disturbing implications about the duties that multiple defendants may owe each other when one defendant wants to settle and another refuses and each can "injure" the other if neither can make a separate peace, or if, in settlements, each owes a duty of "good faith" conduct to the other.

[57]N.Y. GEN. OBLIG. LAW § 15-108(b) (McKinney Supp. 1976), provides that a release given under subdivision (a) will relieve all liability for contribution if "given in good faith."

[58]Bad faith bars a right to contribution. American Export Isbrandtsen Lines, Inc. v. United States, 390 F. Supp. 63 (S.D. N.Y. 1975); New Amsterdam Cas. Co. v. Lundquist, 198 N.W.2d 543 (Minn. 1972).

[59]*See* note 57 *supra;* Keeton, *Liability Insurance and Responsibility for Settlement,* 67 HARV. L. REV. 1136 (1954); Schwartz, *Statutory Strict Liability for an Insurer's Failure to Settle: A Balanced Plan for an Unresolved Problem,* 1975 DUKE L.J. 901.

There are other objections to the use of a "good faith" standard. First, a subjective standard like good faith will always be difficult to use. Subjective standards create uncertainty, unlike pro rata settlements where a party that settles gets a release of the percentage of fault attributable to the settling party. The pro rata release is objective if all parties, including the one that settles, are kept in the suit until the jury's verdict fixing of fault percentages are known. This approach, keeping the settling party in the suit, would also resolve the indemnity problem if it has not been resolved by accepting the great contribution of *Dole v. Dow*: the concept that indemnity and contribution are merged into the principle of comparative fault. Without such a merger, no manufacturer can obtain a settlement and be free from claims that the manufacturer must indemnify a seller that refuses to settle. Under distributional fault if the retailer of a product was without fault, the jury should find no percentage of fault attributable to the retailer that refused to settle, while fixing all the fault on the manufacturer that settled, or the plaintiff. This might distress retailers who claim that when they pass on a manufacturer's product they are entitled to indemnity in the full sense: attorney fees,[60] as well as protection against amounts paid out in satisfaction of claims; but one of the complicating factors in products litigation is that the plaintiff not only sues the manufacturer, but sues the retailer as well, as permitted by present doctrine.[61] Plaintiffs do this to keep the foreign manufacturer from removing cases filed in state courts to the federal courts, as well as for other reasons. Also, there may be independent grounds for recovery against local defendants. They have duties to warn and can appraise the use the buyer intends to make of the product, so when the law of indemnity with its provision of attorney fees for the defendant entitled to indemnity is used, there will be inevitable tenders of the defense to the manufacturer and refusals when the manufacturer sees the plaintiff making direct or independent claims against the retailer or when such grounds are suspected. When it is the plaintiff that elects to sue the retailer as well as the manufacturer, and an obvious additional reason for this joinder is to increase the number of defendants that can be expected to contribute to a settlement, it seems odd to allow this plaintiff tactic to be used to fasten the cost of the retailer's attorney fees on the manufacturers. It seems appropriate to allow each defendant to handle its own defense unless there are contractual indemnity agreements, and not to allow adherence to indemnity at or implied by law to give the retailer the right to recover attorney fees and threaten such

[60]*See* Sendroff v. Food Mart Inc., Conn. L. Tribune, March 21, 1977, at 24, col. 2.
[61]RESTATEMENT (SECOND) OF TORTS § 402A (1965).

recovery to coerce the manufacturer to assume the defense and payment of all settlement costs.

Second, even with a "good faith" test the proposed act fails the distribution test; even though the Uniform Comparative Fault Act could be claimed to roughly satisfy the threshold test of distributional justice. Plaintiffs who want to pick up a readily available settlement from the underinsured defendant will suggest that the offset solution is best.[62] They would drop from the trial the defendant that settles and allow the suit to proceed with the jury instructed to proportion the damages or fault among the remaining parties only.[63] This could be said to distribute the percentage of fault of a party that settles between the plaintiff and defendants that remain in the suit. While this may solve the problem of making the Uniform Act consistent in a fashion, provided the amount received in settlement is used to reduce the total damages that will be divided among the parties in proportion to fault, such a solution does not obscure its impact. It still makes the remaining defendants provide coverage for risk of the settling party's underinsurance. Further it requires a belief that a plaintiff's degree of fault will be increased when a defendant who seems at fault is absent. The reasoning of *Payne v. Bilco* points in the opposite direction. In order to fairly determine the respective degrees of fault the jury should consider and fix the respective degrees of fault of all parties.

Dropping the defendant that settles not only conflicts with what *Payne v. Bilco* teaches us, it makes civil litigation more like the criminal case described in *An Anatomy of a Murder*, where the defense seeks to point the finger of blame not only at plaintiff, but at an absent party. Some defendants might like this, since it creates the possibility that jurors will suspect that where a party clearly at fault is not before the court the plaintiff will have settled with that defendant. If one of the underlying reasons for adopting comparative negligence is that it was thought that when contributory negligence was a bar the jury was acting in an "outlaw" fashion when they compared negligence and reached compromise verdicts on damages while finding the plaintiff free of negligence, this approach (thinking that the jury will speculate about possible settlements with a party not before the court) is also an "outlaw" approach. Should not the jury be given all the facts?

The third is that by dropping the defendant that settles, the only

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[62] *See* note 49 *supra*.

[63] The answer to this suggestion that juries will apportion the fault of absent defendants among the plaintiff and the remaining defendants can be found not only in the decisions collected in note 22 *supra*, but also has been perceptively analyzed by Fisher, Nugent, & Lewis, *supra* note 6, at 666.

test of "fairness" is lost. Should not the party that settles be before the court and jury to get a final appraisal of the degree of fault attributable to the settling party as well as the party that has not settled? And, when this is done, and the figure of settlement does not nearly approach the figure determined by multiplying the damages by the settling party's degree of fault, cannot it be argued that the figure was not a "good faith" settlement?

F. *Problems Under the New York Pro Rata Release*

The New York solution, which makes a settlement with one defendant a release of that defendant's percentage of fault, encourages the opposite tactic in settlement negotiations from the offset approach. A plaintiff will not willingly accept the policy limits of an underinsured defendant before trial, but will settle with that defendant only after the main (in the sense of assets as well as possible degree of fault) defendant has settled. If the main defendant does not settle, the plaintiff will not take the policy limits of the underinsured defendant in prejudgment settlement, but will wait until after judgment. This is a logical result when the principle of joint and several liability permits the plaintiff to shift to any defendant able to respond in damages the whole loss, including the costs attributable to the fault of the underinsured defendant. Unfortunately it also promotes sharp practice: the plaintiff may not settle with the underinsured defendant, but may make a collateral agreement not to collect on any judgment in excess of the underinsured defendant's policy limits; or the plaintiff may bargain with that defendant for other cooperation in fixing responsibility on the solvent defendants or increasing their degree of fault.

In the rush to adopt comparative negligence in order to give plaintiffs at fault a right to collect damages and remove the last real contingency, the consequences of adopting a principle that distributes the losses in proportion to fault were not fully considered. Too little consideration was given to how this principle affects settlements. Only the effect in trials seems to have been considered. Now, however, the risk of an increase in sharp practice by the lawyers who want to zero in on the defendant that can respond in damages and let those with little or no resources escape must be considered. There must be some way to control misuse of the settlement provisions and the malapportioned results obtained by loan receipts, and even from covenants not to sue. The practical way is to limit the responsibility of defendants that go to trial (or settle) to responsibility for their own degrees of fault. If all actors are not made parties, those before the court could share the fault of defendants not made parties, but only by limiting the responsibility of

parties before the court to such an expansion from their own degrees of fault can sharp practices be controlled.

Another method might be to let the jury know everything. Let the jury know that a defendant is underinsured and that when percentages of fault are assigned to that defendant they are really fixing responsibility on the remaining defendants. A jury that knows everything might well apportion the underinsured defendant's responsibility between the plaintiff and the remaining defendants, and, of course, may decide to help a plaintiff recover "all" from a defendant guilty of some lesser degree of fault.

If juries are not told the fact of settlement and its effect, they may guess that a plaintiff employee gets compensation and the carrier will reach part of the proceeds of the suit by subrogation[64] or

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[64]In a recent jury case in Conneticut Bernier v. National Fence Co., No. 42408 (Sup. Ct., New London County, Conn. June 28, 1976) (motion for new trial denied), a state employee was killed when attempting to rescue employees of a contractor working on state property. The suit was similar to *IPALCO*. The decedent's plaintiff could not sue the state, which paid compensation, so suit was brought against the third-party defendant on the theory there was negligence in failing to cut off the electric power in the area where the men were working.

At the outset of the jury trial it came to the attention of the attorneys that members of the jury may have read an account of the suit in the local paper. In the examination of the jurors it was found that a juror had read an account of the suit and that the juror knew the ad damnum figure mentioned in the article. After discussion, the attorneys accepted the juror and the judge instructed the juror not to discuss the article with other jurors.

After the trial, which resulted in a verdict for the third-party defendant, it was discoverd that among the newspaper articles on the trial there was one that concluded by stating that the State was a party seeking reimbursement of compensation.

In overruling the plaintiff's motion in arrest of judgment based on this discovery, the trial court concluded that the right to object was waived. Although this case may ultimately be reported, it will probably not explore the impact that a juror's knowing that the decedent's employer was going to be subrogated to the claim against the third-party defendant had on the verdict. However, the fact jurors are not wholly ignorant cannot be ignored. Many jurors are employees and may well know that in their state cases like *IPALCO* permit even a negligent employer to cast all the costs of employee injury, including reimbursement for the compensation paid, on the third-party defendant. If that legal rule is known, or even guessed at, jurors might well return a verdict for a third-party defendant because jurors could easily disapprove of a negligent employer getting reimbursement from the relatively less blameworthy third-party.

One such case may not be sufficient to support a generalization, but there is a great temptation to conclude that where an employer is negligent a jury would not like the *IPALCO* results and that trying to keep the jury in the dark may be worse than letting them know the effect of their verdict. For attorneys engaged in suits by employees against third-parties, the plaintiffs' attorneys might pause as they consider whether to take a fairly knowledgeable employee who might know that the employer will seek reimbursement from the jury verdict, and attorneys for the third-party defendant might more willingly take such employees as jurors in the hopes that

they may guess that the plaintiff has settled for a small sum with an obviously-at-fault defendant just because that defendant was underinsured. A plaintiff would not want the jury to know such facts because the jury might use the settlement figure and what they find to be the settling defendant's degree of fault to determine the extent of damages.

G. What Should A Jury Know About Settlements?

It is in the area of how much the jury should know that there is the least guidance. Would it be grounds for reversal to learn from a juror after trial that the jury discussed the probability that one defendant had settled, or that the compensation carrier of the employer of the injured plaintiff would reach part of the proceeds of a suit?[65] It can be argued that no plaintiff will settle if that settlement will be made known to the jury; however, the lawyers and judges know or should know such facts, and they may play a role in pretrial settlements. If this is so, why shouldn't the jury know too? Further, there are ethical dilemmas for a defendant's lawyer who has settled with the plaintiff, perhaps with a loan receipt and subrogation agreement. Is it ethical for this defendant to come before the court and jury to argue that the remaining defendant is really at fault and should respond in damages, without also revealing that the defendant will profit by the bigger award against the other defendant?[66]

Perhaps some practical considerations in the controversy over letting the jury know about compensation benefits and settlements should be mentioned. If the jury is allowed to know what dollar amount the plaintiff will receive from the compensation carrier, employers might object because this will lead to pressure to raise compensation benefits. Unions might be in a dilemma: if the evidence were introduced, the jury might index off the compensation benefits to estimate the damages due one plaintiff under the common law, but if employers object they might well see that in the

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evidence of the employer's fault can be coupled with the juror's knowledge that a verdict for the plaintiff may serve to shift losses from the "at fault" employer to a relatively less blameworthy third-party.

Finally, courts unwilling to let juries in *IPALCO* states know what will be the effect of an employee's verdict against a third party might well wonder at the desireability of the *IPALCO* rule if it must be kept from the jury out of fear that jurors might not want to let an "at fault" employer recover from the third-party defendant.

[65] *Id.*

[66] A recent Indiana decision, City of Bloomington v. Holt, 361 N.E.2d 1211 (Ind.Ct. App. 1977) shows a defendant unhappy with having to defend with a loan-receipt defendant who is a "wolf in sheep's clothing."

long run the interest of the unions in getting increased compensation benefits is more important than what an individual plaintiff gets.

Letting the jury know what the plaintiff received in a settlement with a defendant while the plaintiff proceeds with another defendant presents a much sharper controversy, one with few compensations for the plaintiff if the settlement is a bad one. Plaintiffs will object to letting the jury know that the plaintiff has settled with one defendant because it is far more likely that if the amount is known or even guessed at by the jury, the jury will index off that figure by estimating what percentage of fault the settlement covered and fix the amount of damages using the plaintiff's own acts to estimate them. Plaintiffs will surely say this discourages settlements in which they accept the policy limits of the underinsured or seemingly reasonable sums from asset-poor defendants. It will be said to require the making of side agreements between the plaintiff and such defendants not to execute on any judgment against such defendants in excess of some agreed upon sum rather than the payment of the available money to the plaintiff when the agreement is reached. The possibility of such back door tactics might support the argument that under a distribution principle there need not be joint and several liability among multiple defendants before the court. So long as there is joint and several liability, plaintiffs will be tempted to negotiate with some asset-poor or underinsured defendants to get their cooperation and guarantees similar to Mary Carter agreements, when Mary Carters and their substitutes should fall as inconsistent with the distribution principle. Here, the decision in *Israel Aircraft*[67] might help. Courts have ways to compel the parties to keep all their actions aboveboard and open to judicial review.

To the extent that the desire to promote settlements can be said to require that a party be able to buy its way out of litigation expenses as well as limit exposure, it will be objected that keeping a party in a suit once it has settled defeats two of the three motivational tests. Defendants want to avoid litigation expenses and adverse findings, as well as limit their exposure. But if the defendant has settled for the percentage of negligence ultimately attributed to that defendant, and the jury knows this, the expense of defending such a party must surely be less than what it would be if that defendant had a continuing exposure. The jury would understand why a defendant was not active if it knew that defendant had

[67]Israel Aircraft Indus. v. Standard Precision, 72 F.R.D. 456 (1976). The failure of Israel Aircraft to reveal payments in exchanges for releases from the defendant to the court and the jury was deemed under Rule 37 and Rule 60(b) to warrant the reversal of the $1.2 million verdict.

settled. Thus the avoiding litigation expense test could be substantially satisfied without sacrifice of the distribution principle if the jury was told that a given defendant had settled even if the jury was not told how much that defendant had paid. A compromise that might help keep the jury from becoming "outlaws" would be to tell them of the fact of settlement even if the amount was kept from the jury so they would not index off the figure. This could be done even in the case of compensation benefits. The jury could know the scheme, without knowing the amounts involved, and be told to fix total damages and percentages, leaving with the court the responsibility to look at the figures and apply the percentages.

Finally, it will be argued that even if the dollar figure is not disclosed, the mere fact that a settling defendant is kept in and a verdict may come down fixing some percentage of fault will defeat the final stated reason why defendants settle, the desire to avoid a determination they were at fault. Here again, if the figure is disclosed this purpose will be defeated, but if the figure is kept from the jury, not reported by the courts, and not discoverable by subsequent plaintiffs who sue that defendant, the mere fact that a defendant bought its way out, and did not actively defend, should cut the edge off any verdict fixing some degree of fault on the defendant that settled.[68]

These slight disadvantages of the pro rata approach in damaging the two secondary motivations for settlement, can be said to offset the clear advantage the pro rata system has over the offset provision in achieving distribution of costs in proportion to fault. However, I believe the adverse effects of a true pro rata system on the lesser motivations are far fewer than the disadvantages of the offset approach in failing the distribution test. The offset approach denies distribution in proportion to fault, promotes sweetheart settlements, and can only devise a poor method of policing them. The offset method does not keep all parties in the suit to permit the use of *Dole* comparative fault to cover the problem of indemnity which will always complicate product cases because the rights of all parties are not adjudicated in one comparison of fault, but may require further litigation.

For all these reasons, it is suggested that the percentage scheme (and not the dollar amount) of the New York statute makes sense. It

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[68]Courts serious about promoting settlements cannot fail to see that letting other plaintiffs use discovery rules to look at prior settlements can have a chilling effect. The plaintiff seeking to find out about prior settlements wishes to find an index of that experience. The discovery issue and its effect on settlements cannot be explored here, but it is an area that will have to be worked out as part of a full theory of settlements under the distribution principle.

will force the plaintiff to look for a settlement with the "main" defendant, as was apparently done in *Castillo*, and then the little or underinsured defendants can settle. Settlements with the underinsured first will cause a malapportionment of the percentages of fault if the plaintiff compares fault with the main defendant alone.

H. Reasons Pure Pro Rata Settlements Are Preferable

The New York statute provides that a settlement by one defendant will reduce the liability of the remaining defendants by either the degree of fault or the amount received,[69] whichever is larger. Settlements are more likely to be encouraged if percentages alone are used. If a plaintiff stands to lose by a disadvantageous settlement (one where the cash received was less than the percentage of that defendant's fault times the total verdict), giving the plaintiff the benefits of a good settlement (one where the cash received was greater than the settling defendant's degree of fault times the verdict) might encourage settlements.

Under an analysis of the settlement as a contract, it is difficult to conceive that there would ever be an intent, by either the plaintiff or one defendant who settles, to give any dollar benefit to the remaining defendant when settling parties agree to a pro rata reduction. If those bargaining parties think of a benefit when the dollar amount of the settlement exceeds the settling defendant degree of fault times the ultimate verdict, they would consider that a benefit for the plaintiff.

For these reasons, it is suggested that a pro rata release should not be coupled with a dollar offset. Pro rata settlements carry out the principle of distributing fault. A plaintiff that runs the risk of a bad settlement and getting too little when releasing a percentage of fault can reap the benefit of a good settlement under a pro rata only provision. Finally, it is difficult to believe the defendant that refuses to settle should be considered a third party beneficiary of a good settlement by the plaintiff with a defendant that settles. The only possible reason for keeping the dollar offset in pro rata schemes is that in some cases the presence of judgment-proof defendants will, under joint and several liability, result in a defendant that refuses to settle having to bear costs that exceed the jury determination of that party's percentage of fault. If each party bears only its own degree of fault, no reason exists to continue the dollar offset.[70]

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[69]N.Y. GEN. OBLIG. LAW § 15-108 (Supp. 1976).

[70]Fisher, Nugent, & Lewis, *supra* note 6, at 665-66, discuss how Texas lawyers have the option to include the defendant settling to achieve a pro rata distribution or not include the settling defendant and have a pro tanto credit. This requires tactical thinking and an evaluation of whether the settlement was excessive or inadequate.

Before leaving New York to look at other states, it might be asked why the scheme of section 15-108 as applied to a consumer product defendant that settled was not legislatively applied to the negligent compensation covered employer who has "settled" with the plaintiff employee under the compensation act. For the New York lawyer perplexed by this lack of coordination, the obvious suggestion is that compensation covered employers sued on a *Dole* theory should argue equal protection brings them within the provisions of section 15-108. Authorities that may be relevant to this argument will be discussed in a later section of this paper.

I. Avoiding Responsibility for the Fault of Others as a Motivation for Settlement

The principle of distributing costs in proportion to respective degrees of fault seems to call for the abandonment of joint and several liability among parties before the court unless one defendant can be said to be responsible for the fault of the other as, for example, under respondent superior. When plaintiffs as a group were anxiously awaiting the day that contributory negligence would no longer be a bar, they argued it was wrong to have an all or nothing principle apply to them. It was argued that even if the plaintiff was only slightly at fault and a defendant's fault far exceed the plaintiff's, it was not proportioned justice to allow the defendant to escape responsibility. It is just as logical to suggest that the principle of joint and several liability among codefendants before the court is an "all or nothing" principle (possibly based on the concept that any cause of an innocent plaintiff's injury was sufficient to warrant the imposition of liability for all damages on that cause) that should be rejected and not applied to make a fiscally able defendant guilty of two percent fault pay for the judgment proof defendant's ninety percent of the fault now that the plaintiff escapes the all or nothing principle of contributory negligence as a bar. It is equally a malproportioned form of justice.

This is not the place to mount an extended attack on joint and several liability or consider what may be the landmark case, *American Motorcycle Association v. Superior Court*;[71] however, joint and

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[71]American Motorcycle Ass'n v. Superior Court, 65 Cal. App. 3d 694, 135 Cal. Rptr. 497 (1977) should be the subject of a plethora of writing even if not discussed here. It is a thoughtful and logical working out of the distribution principle. If the life of the law is not logic the case may not be approved by the highest court in California. Yet it still is worthy of study because it concludes that the adoption of comparative negligence requires a distribution of the loss among multiple tortfeasors in proportion to their respective degrees of fault and refuses to permit the use of the doctrine of

several liability is an all or nothing principle that is often inconsistent with a principle calling for distribution of costs. It is suggested here that if all parties are present, costs can be distributed among the parties to the suit, and that a problem arises in settlements when one defendant seeks to avoid responsibility for more than a pro rata share of costs by settling. If one defendant settles for only the pro rata share, and others whose conduct contributed to the plaintiff's injury are not before the court, a plaintiff can use joint and several liability to fasten upon the defendant that does not settle all responsibility for the defendants who are not present in the suit.

To use an area of tort law that is not as emotional as personal injury, consider the problem of one of a number of defendants who put salt water in a stream and is sued by an injured plaintiff. The classic Texas cases are *Sun Oil Co. v. Robicheaux*[72] and *Landers v. East Texas Salt Water Disposal Co.*[73] *Robicheaux* held that a plaintiff could recover from a given defendant only for the damages apportioned to the salt water that defendant added to the stream. *Landers* overruled *Robicheaux* and held that where an injury "cannot be apportioned with reasonable certainty" among the individual wrongdoers, all the wrongdoers will be held jointly and severally liable for the entire damages. It is suggested that both are extreme solutions, with *Landers* being preferable so long as the plaintiff was without fault, and *Robicheaux* when the plaintiff shares fault.[74] This

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joint and several liability. If it is not already known as the "joint and several liability" case, it will be so known.

Where joint and several liability is ended, as it is in Vermont, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1977), there is no need for contribution because no defendant pays more than the proportion of damages allocated in the jury's verdict fixing degrees of fault. This raises an interesting problem of what courts should do when comparative negligence is adopted in the two party suit, and nothing else is done; should they then allow contribution? *See* the discussion of *Hayes v. Hazard*, in note 16 *supra*. Should they go further and adopt the result in *American Motorcycle?* Perhaps at another time it will be possible to state more fully why a rule of contribution between tortfeasors seems appropriate where the plaintiff is not at fault because the plaintiff keeps the right to hold the defendants jointly and severally liable. But when the plaintiff is at fault, as well as the defendant, then all are "active." If logic says the plaintiff can hold defendants jointly and severally liable, then one of multiple defendants required to pay more than a proportionate share under the doctrine of joint and several liability should be able to recover contribution on a joint and several basis from all active parties, even the plaintiffs, less only the share of the defendant.

[72]23 S.W.2d 713 (Tex. Com. App. 1930).

[73]151 Tex. 251, 248 S.W.2d 731 (1952).

[74]Continuity with the past might justify the retention of joint and several liability when the plaintiff is not at fault. However, when comparative negligence is introduced so that an "at fault" plaintiff can recover from others at fault, especially in a pure comparative negligence jurisdiction, the possibility that a defendant—guilty of a lesser

is a middle ground, distributing the costs among parties in the suit in proportion to their degrees of wrongdoing as perceived by the jury when the plaintiff as well as the defendants are at fault. No plaintiff could then shift the risk of one defendant's being underinsured or unable to respond to damages to another defendant, so long as all defendants are in the suit, even those who have settled. The risk of one defendant being unable to pay for the share determined by the jury should be spread between the plaintiff and the remaining defendants in proportion to their respective degrees of fault, after all degrees of fault have been determined, much as the Uniform Comparative Fault Act provides in cases in which a judgment against one defendant cannot be collected.[75]

Until all the implications of comparative negligence and comparative contribution are worked out, and so long as defendants are operating under the rules of joint and several responsibility and no contribution, but merely a setoff for prior settlements, there will always be a holdout in multiple party situations. There will be at least one defendant who does not want to contribute anything. Perhaps there has been a tender of the defense to another defendant and the hope that the ultimate loss can be shifted to the manufacturer even though the holdout may have been guilty of failure to warn. Or the holdout may merely believe that the plaintiff was guilty of misuse of the product and should not recover. If courts are really serious about promoting settlements, that defendant can be seen as a "dog-in-the-manger" and maybe needs to be allowed to go the whole route. He can get off scot free if he wins but may lose and suffer a judgment for all the damages with only a setoff for what the settling defendant paid. Having taken the chance, I believe the "reluctant-to-settle" defendant should be cut off from all rights against any party who settles even in the confused state of the law at present.

The theory is there to effect this result in the employee-plaintiff cases. Many courts, such as the Iowa court in *IPALCO*,[76] have held that when the employee has no direct cause of action against the employer, the third party tortfeasor cannot sue the employer for contribution. It would be simple to extend this immunity of the employer who settled under the compensation act to the consumer product defendant that settled privately while the action proceeds

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degree of fault than a plaintiff and sued with other defendants unable to respond in damages—might be required to bear all the degrees of fault of others, seems to require some relief, perhaps the relief provided in *American Motorcycle*.

[75]*See* Wade, *supra* note 7.

[76]259 Iowa 314, 144 N.W.2d 303 (1966).

against the other defendants. The obvious reference is to an equal protection argument rather than an appeal to courts to merely apply this requirement of contribution (that the plaintiff *have* a direct right) as a matter of consistent application of contribution doctrine. The equal protection authorities discussed in a later part of this paper should be helpful here as they might be in efforts to let compensation covered employers in New York come in under section 15-108. Before reaching the equal protection arguments, some analysis of contribution and indemnity is necessary.

V. The Confused History of Contribution When a Plaintiff's Contributory Negligence Was a Bar

If the rule that contributory negligence of a plaintiff is a bar was based on the assumption that courts need not look out for someone who does not look out for himself, the same assumption could be the basis of the rule of no contribution among joint tortfeasors. Elementary logic suggests a rule that a tortfeasor at fault cannot collect contribution has to fall when the rule that a plaintiff at fault cannot recover falls.

The common law rule of no contribution among tortfeasors is generally recognized as having its origin in *Merryweather v. Nixan*,[77] and was the subject of many analytical writings in the 1930's.[78] One of the writers of the 1930's proposed a statute proportioning or distributing liabilities in accordance with the degrees of fault.[79] This suggestion was referred to a proposed statute for Wisconsin[80] and in turn was relied on by Arthur Larson in a lengthy article.[81] In

[77]8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). However, it could be placed earlier, as suggested in Reath, *Contribution Between Persons*, 12 Harv. L. Rev. 176 (1898) in a discussion of *Battersey's Case*, Winch's Rep. 48, decided almost a century before.

[78]Perhaps the landmark work is C. Gregory, Legislative Loss Distribution in Negligence Actions (1930). An argument against apportionment, James, *Contribution Among Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941) led to a debate between Gregory and James in volume 54 of the *Harvard Law Review*.

The work of other eminant writers in this period should not be overlooked, in addition to Professor Larson's article cited in note 81 *infra*, there was Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1930), and Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L.Q. 552 (1936) (Part I) and 22 Cornell L.Q. 469 (1937) (Part II).

[79]Note, *Contribution Between Tortfeasors: A Legislative Proposal*, 24 Cal. L. Rev. 702 (1936). This article looked to a New York Law Revision Committee report, Legis. Doc. (1936) No. 65 (K)4, which proposed a statute distributing liabilities in accordance with degrees of fault.

[80]Note, *Contribution-Joint Tortfeasors—A Proposed Act*, 1938 Wis. L. Rev. 580.

[81]Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party*, 1940 Wis. L. Rev. 467.

reading Professor Larson's treatise and critizing it when I wrote on this subject[82] I debated asking why had Professor Larson dropped from his treatise the suggestion he so forcefully urged in 1940, and which was enacted for all but compensation covered employers when New York enacted section 15-108 of its General Obligations Law.

Perhaps Larson abandoned his proposal because the works cited above had no immediate effect because of judicial and legislative adherence to the rule that contributory negligence was a bar to a plaintiff's recovery. It has only been with the spread of comparative negligence to more than half the states that we have been forced to relive and rewrite the work done in the 1930's, and that the Wisconsin courts, in cases like *Payne v. Bilco*,[83] have done what Larson urged the legislature to do forty years ago. I suggest that many of the leading articles of today[84] are rooted in the debate of the 1930's. Finally, it is only fair to acknowledge that Larson's 1940 Wisconsin article proposed a solution quite similar to the one I proposed in 1976.[85]

Unfortunately the Uniform Contribution Among Tortfeasors Act did not clarify the problem, and the practicing lawyer is probably more interested in looking at an annotation collecting cases not decided under the Uniform Act[86] than one dealing with cases decided under the Act.[87] A review of the few cases collected in these annotations, and the supplements, shows that the cases decided in the absence of a statute spelling out the effect of a settlement on the right of the remaining defendants to contribution, are divided. Some allow contribution from the defendant that settled,[88] a result changed by statute in New York, while others do not. Unlike Professor Larson, who in his 1940 *Wisconsin Law Review* piece concluded there should be a right to contribution from a defendant who settled—despite his initial conclusion there should not be a right to contribution—I believe that the policy reasons discussed in cases such as *Castillo Vda Perdomo*, especially the desire to end exposure, as well as equal protection arguments looking to the treatment of compensation covered employers, require that one defendant's settlement with the plaintiff be a bar to suit for contribution in the ex-

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[82]Davis, *supra* note 5.

[83]54 Wis. 2d 345, 195 N.W.2d 641 (1972).

[84]*E.g.*, those collected in note 6 *supra*.

[85]Davis, *supra* note 5.

[86]Annot., 8 A.L.R.2d 196 (1949).

[87]Annot., 34 A.L.R.2d 1101 (1954).

[88]Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N.Y. 746 (Sup. Ct. 1931).

panded *Dole v. Dow* sense by defendants that do not settle, provided that the settlements are pro rata settlements.

Another conclusion from a review of the literature is that urging legislatures to work out a solution came to very little. However, the implications and suggestions of such pieces as Larson's 1940 article have been realized in *Payne v. Bilco* and show that the logic of conforming the rules of contribution and implied indemnity to the practice of settlement requires that a settling tortfeasor be able to obtain protection from suits for contribution and indemnity implied at law.

VI. Equal Protection

A. Background

Notions of equal protection may have played some role in the adoption of comparative negligence because settlements have long been made on a comparative basis even in states where contributory negligence was stated to be a bar. The difference between such settlements and litigation where the jury applied comparative negligence may have offended equal protection notions and may help bring about wider adoption of comparative negligence.

It is not the purpose here to trace the evolution of equal protection from a constitutional guarantee limited to undoing discrimination against persons on the basis of race[89] to use in an expanding number of other areas[90] (including worker's compensation).[91] However, some background on equal protection seems necessary. It generally involves a claimant, or a group of claimants, who find a factually similar situation which state or federal law treats more favorably than their own, and then urge the courts to place a carpenter's level (equal protection) on these two similar cases and bring them up "equal." Sometimes the efforts are limited to evidence of inequality on the face of a statute, and sometimes evidence is brought forward to show inequality in the impact of a statute.

The analogy of the carpenter's level was suggested by a colleague, Professor Alan Cullison, at a time when the author was putting down a stone walk. We visualized the carpenter's level as a rather short tool, useful to bring up one stone when it had sunk, or was laid, a little below its neighbor (by the legislature and, in impact

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[89]The Slaughter-House Cases, 83 U.S. 36 (1872).

[90]*Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969) and Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

[91]E.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

cases, perhaps by administrators although almost never by courts)[92] but not useful for leveling over long distances—for example, from inside the compensation system to the common law system[93] or when the slope of the ground indicated that there be steps as in the "one step at a time" doctrine of *Jefferson v. Hackney*[94] permitting benefits for permanently and totally disabled to differ from benefits for Aid to Families with Dependent Children. Further, judicial repairs made under equal protection, like stone walk repairs with a carpenter's level, require that the courts ask whether, when two stones are uneven, the claimant's stone should be raised or the other lowered.[95] And finally, where a statute treats dissimilar cases alike—for example, gives the same benefits to persons suffering different degrees or kinds of incapacity—equal protection cannot be used to proportion differences in treatment.[96]

Although the focus here will be on equal protection, there is an interaction with due process. Equal protection has been less concerned with motivation than due process, unless the widow's tax exemption case[97] which may be viewed as a remedy for past discrimination can be cited as a motivation case. If it can, perhaps motivation may fit into the anology of the carpenter's level to the extent that it may help reach the conclusion that improperly motivated classifications, or steps, are arbitrary, and do not rest on a rational basis.

B. Arguing From the Compensation Statute To Give the Defendant Who Settles Equal Protection

Let us now consider Iowa, a state which unlike Connecticut, even though it held to the rule that a plaintiff's negligence was a

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[92]Perhaps one of the difficulties with the impact cases is that impacts are often judicial. The author collected all of the Connecticut compensation decisions involving "Arising and in the Course" including court opinions as well as commissioners' decisions and pointed out that there were real questions of equality of treatment within factually similar cases as well as across roughly similar cases. If the article—assuming it correctly stated what the courts had done—were enacted as a statute, would the courts strike the statute on the grounds it denied equal protection?

[93]Kaznoski v. Consolidation Coal Co., 368 F. Supp. 1022 (1974).

[94]406 U.S. 535, 546 (1972).

[95]This is the problem considered in Mr. Justice Harlan's concurring opinion in Welsh v. United States, 398 U.S. 333, 344 (1970).

[96]*See* Davis, *Schedule Injuries—Equal Protection*, 33 ATLA L.J. 196 (1970).

[97]Kahn v. Shevin, 416 U.S. 351 (1974). An annual property tax exemption for widows was provided by Florida statute since at least 1885. In suit by widower claiming a denial of "equal protection," the court declined to give widowers a similar exemption. The majority opinion speaks in terms of reparations or compensation for widows who have been denied equal access to jobs and pay in the past, but it would not be unrealistic to see this as a case involving "good" motivation, not a classification made merely for administrative convenience.

bar to recovery, did not hold to the corollary rule barring suits for contribution.[98] When the Iowa Supreme Court decided *IPALCO* it rejected the passive-active basis for allowing contribution or indemnity and held that a third party tortfeasor could not sue a negligent employer for contribution or indemnity when the employer had provided compensation coverage. Reasoning from the fact that the employee had no direct action against the employer, the Iowa court held[99] that a third party tortfeasor could not sue the negligent employer for contribution.

The Iowa requirement that the plaintiff in the suit from which the right of contribution or indemnity develops must have a direct right against the defendant against whom contribution or indemnity is sought is also the basis for decision in *Blunt v. Brown*,[100] a case which involved both marital immunity and the automobile guest statute, and it denied the defendant sued by the auto guest a right to seek contribution from the driver of the plaintiff's car.

Admittedly in both *IPALCO* and *Blunt v. Brown*, the defendant against whom contribution was sought had been immunized by statute from direct suit by the injured plaintiff: in *IPALCO* the compensation statute, and in *Blunt* the guest statute as well as the marital immunity. However, Iowa did not have a compulsory compensation statute; either the employer or the employee could elect out.[101] Is there a rational basis to distinguish an Iowa employer that "settles" with an employee by voluntarily coming under compensation and the employer that does not come under compensation but settles with an employee on an individual basis? Should not equal protection say that if the compensation covered employer cannot be sued for contribution or indemnity because the employee (the injured party who sues the third party defendant) has no direct right, then the employer who did not elect coverage but voluntarily settled should also enjoy protection from actions for contribution or indemnity when the third party defendant sues? In both cases the injured party has no direct action. Finally, where one of multiple product defendants is sued, should not the product defendant that settles be accorded the same protection against suits for contribution and indemnity that the court has accorded the employer that voluntarily settles?

Despite the general tendency to not consider equal protection arguments in such cases, there is at least one third party tortfeasor

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[98]*See* Furnish, *Distributing Tort Liability: Contribution and Indemnity in Iowa*, 52 IOWA L. REV. 31 (1966).

[99]*See* note 31 *supra*.

[100]225 F. Supp. 326 (S.D. Iowa 1963).

[101]*See* Davis and Others, THE IOWA LAW OF WORKMEN'S COMPENSATION (1967).

opinion that offers some help in considering this argument. In *Coleman v. General Motors Corp.*,[102] an employee was injured while installing equipment in a General Motors plant. The employee sued General Motors who in turn sued the employer who was allegedly at fault. In granting the employer's motion for summary judgment the court cited cases holding that where the injured party has no direct right against defendant, another defendant cannot sue such a defendant for contribution or indemnity.

The court then went on to consider claims of a violation of equal protection by such a decision, which the court said is:

> [T]he proposition that because it voluntarily chose to deal with an employer with greater than five employes, . . . [and subject to madatory compensation coverage] and is sued for its alleged negligence by an employee of such employer, then it is denied equal protection because *if it had* chosen to deal with an employer with less than five employees who did not voluntarily elect to be covered by workmen's compensation, and was similarly sued, then it could maintain a third-party suit. The classification complained of by General Motors then would have to be third-party joint tortfeasors who deal with . . . employers not mandatorily covered and who voluntarily chose not to be covered as the other class.[103]

The court concluded: "Such a classification first is not created by the statute and secondly is too tenuous a classification on which to hang an equal protection argument."[104]

I suggest that there is a classification and that the real reason General Motors lost its equal protection argument was that there is a rational basis for distinguishing a defendant sued for contribution that has settled with the injured party and a defendant that has not.

The *Coleman* court does not say this, but its opinion helps focus the issue, which is: Is there a rational basis for different treatment of a defendant that settles, either individually or by voluntarily accepting compensation responsibility, to an employee and one of multiple product defendants that settles with the plaintiff? *Coleman* does not face this issue, and I have not been able to find, albeit in a hurried search, any case that has; however, the compensation statute in Iowa classifies employer's compensation settlements as a defense to suits for contribution and indemnity (as it is construed) and thus creates two classes: Compensation covered employers (and

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[102].386 F. Supp. 87 (N.D. Ga. 1974).

[103]*Id.* at 91 (emphasis added).

[104]*Id.* at 91.

probably non-compensation covered employers who voluntarily settle) that need not respond in contribution or indemnity to a third party on the one hand, and one of multiple product defendants that settles with the plaintiff on the other.

Is there a rational basis to let employers have such a benefit and deny it to others that voluntarily settle with a product plaintiff? I suggest there is not, but would have to look to other situations where classifications in exculpatory legislation in tort situations have been held to deny equal protection.

Such a situation arose in Illinois, when Illinois courts held that landlords could have exculpatory clauses in leases that were effective to exempt the lessor from liability for the lessor's negligence or negligence attributable to the lessor. In response to this, Illinois legislature enacted a statute making exculpatory clauses in all leases, except those where the lessor was a municipal corporation, government unit, or corporations regulated by state of federal commissions, void.[105] In *Sweney Gasoline & Oil Co. v. Toledo, P. & W. R.*[106] the Illinois Supreme Court struck down this statute holding there was no reasonable basis for the exemptions in the statute.

One way to view *Sweney* is to say that it granted other landlords equality with governmental or regulated landlords. It did this by striking down the statute so non-governmental landlords were given the same right to protect themselves as those landlords excluded from the statute. The analogy of the settlement by one of multiple defendants to *Sweney* is that where an employer gains immunity to an employee's suit because the employer has settled for common law claims by assuming compensation liability, it would be a denial of equal protection to hold that one of multiple defendants who settles voluntarily should be denied the immunity from liability or contribution while the employer who voluntarily assumed compensation has such immunity. There is no reasonable basis for allowing one set of possible multiple party defendants, employers, to elect compensation coverage (and the right to settle and obtain immunity from suits for contributions) from other multiple defendants and not allow other defendants to settle and obtain immunity from suits for contribution.

In view of the fact that in Iowa the employer in *IPALCO* could not only get immunity but could get back out of the employee's recovery against a third party whatever the employer, or the carrier, had paid in the settlement, the multiple defendant who settled has stronger equities to be held immune to contribution actions than

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[105]ILL. REV. STAT., ch. 80, § 15a (repealed 1971).

[106]42 Ill. 2d 265, 247 N.E.2d 603 (1969).

the employer. It is only in the load sharing states, states which follow *Santisteven*, that the equities are even for the compensation covered employer and the defendant that settled.

C. In New York, Getting the Compensation Covered Employer Under Section 15-108, and Out of Dole, by Equal Protection

The ultimate issue in New York is whether there is a rational basis for granting immunity to contribution suits when one of multiple defendants settles (with a reduction of the plaintiff's recovery against other defendants by the degree of fault attributed to the defendant that settles) and the treatment of employers under *Dole*, considering that they have settled their fault with the plaintiff, and must still suffer suits for contribution. From the plaintiff's viewpoint, is it rational to classify a non-employee who settles as distinct from the employee that settles under compensation, and reduce the recovery of the plaintiff who settles with one defendant by the degree of fault of the settling defendant, and treat employees differently, letting them get compensation, sue the third party and not be held to recovery from the third party only to the degree of the third-party's fault?

As New York's compensation statute is compulsory, it could be suggested that the settlement by the employee with the employer is not strictly analogous to a plaintiff's voluntary settlement with one of many third-party defendants. However, this flies in the face of the "trade-off" basis for upholding the compensation act found in the Supreme Court's opinion in *White*.[107]

I urge you to follow the New York situation. *Dole* spawned the New York comparative negligence statute and section 15-108. It will undoubtedly be argued that the New York Court of Appeals should defer to the legislature to act on *Dole* to bring the treatment of employers in line with section 15-108. I merely suggest here that despite such arguments, if the New York Court of Appeals sees that *Dole* has done its work,[108] comparative negligence now obtains, and

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[107]N.Y. Central R.R. v. White, 243 U.S. 188 (1917).

[108]In Klingler v. Dudley, 41 N.Y.2d 362, 393 N.Y.S.2d 323, 361 N.E.2d 874 (1977), the New York Court of Appeals refused to allow a *Dole* plaintiff to reach the third-party defendant directly when the main defendant could not satisfy the plaintiff's judgment. One plaintiff in these suits was limited to the compensation benefits and a small amount from the main defendants and held not to be entitled to reach the employer directly or indirectly when the third-party was unable to respond in damages.

One way of looking at these cases is that the Court of Appeals may be beginning to see that *Dole* has done its work and that the apportionment process called for under comparative fault requires a rethinking of the plaintiff-employee's right to pierce the compensation act because the employer has settled for fault within the compensation system.

section 15-108 has been enacted, the court of appeals might want to blunt the economic disadvantage that *Dole* puts New York employers under when almost no other state makes the employer covered by compensation bear such risks, covered in New York by workman's compensation and employer liability "B" coverage, if at all. If it does, the equal protection argument gives the court the chance to rationally resolve the hottest issue in New York personal injury practice, the compensation-piercing aspect of *Dole;* it can be done by saying that the Constitution tells the court to do so. This would let the Constitution take the wrath the plaintiff's bar would feel when their verdicts are reduced so that the plaintiff injured in a compensation situation is treated like section 15-108 plaintiffs.

VI. Conclusions

When parties settle multiple party suits they settle in proportion to relative degrees of fault. Courts and legislatures are working toward the application of the same distribution principle in trials. Until courts, or legislatures, work out the implication of this distributive principle in a consistent manner for settlements as well as trials, as the Wisconsin court did in *Payne v. Bilco*, courts faced with a situation where one defendant has settled are going to face problems that should be answered by asking how they want settlements to be effected.

The first problem is whether they want to let one of many defendants settle or whether they want to coerce all defendants to settle at once. If they want to coerce all defendants to settle at once they can let a holdout defendant that refused to settle, go ahead and force the other defendants to try the suit because if a holdout defendant suffers a disproportionate judgment the court will let that defendant sue a defendant that settled for contribution or indemnity. However, if courts see that common sense suggests that a defendant willing to settle with a plaintiff willing to accept from that defendant what cash is offered for a pro rata release, no reason exists to prevent such a separate peace, then they will deny the defendant who refuses to settle a right to both contribution and indemnity.

In 1940, Professor Larson said that when one of multiple defendants is considering settling "what the practicing lawyer wants to know is whether he can be assured that an individual settlement will enable him to wipe the case from his books. The answer to his problem can be given with confidence: there is enough doubt on the matter to make it hardly worthwhile. . . ."[109] The adoption of com-

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[109]*See* Larson, *supra* note 81, at 480.

parative negligence and the sweeping of indemnity into the comparison of negligence by *Dole v. Dow* and the use of the pro rata release should permit one of multiple parties that wants to buy out to do so with confidence. Courts have the tools to supply that confidence and to encourage settlements. If this is desired, then it must be asked whether a defendant who settles should be able to cast costs onto a defendant who refuses to settle. I suggest that nothing in the distribution principle supports the right of one party at fault to buy out by a loan receipt, Mary Carter or a covenant not to sue or even under the applicable compensation act, and cast costs on the remaining defendant. The only distributional method is the pro-rata settlement. Under the pro-rata settlements neither the defendant who refuses the settlement nor the defendant who settles can cast costs on the other.

Finally, when one party settles, and another refuses, should the settling party remain in the litigation and special verdicts be used to see if the jury finds the plaintiff can recover from the "holdout" on some independent grounds? If a party settles and is dropped from the trial, the plaintiff and the remaining defendant will worry about the jury knowing something was up and will speculate about what it is. Should the jury be told? I tend to believe that the jury might as well be told all the facts of a settlement short of the actual figures.[110] The jury might as well be told what will be the effect of their verdict.[111]

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[110]*Id.* at 501.

[111]Consider Apelgren v. Agri Chem. Inc., 562 P.2d 766, 767 (Colo. Ct. App. 1977), where the comparative negligence statute provides the jury must be charged on the effect of its findings, and the court says: "[I]t would be mere speculation on our part to hold that the jury verdict would not have been altered had the jury known of the effect of its finding . . . ."

Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort

JOHN F. VARGO*

On March 11 and 12, 1977, I was privileged to be chairman of a Products Liability Institute sponsored by the Indiana Continuing Legal Education Forum, wherein eight of the finest authors, academicians, and practitioners discussed the most recent issues in the area of products liability.[1] The diverse viewpoints expressed about various controversial aspects of products liability law made it apparent that products liability, especially in the area of strict liability in tort, is still undeveloped and highly controversial. The purpose of this Article is to summarize critically the present state of the Indiana products liability law in light of the problem areas discussed at the Institute, and to attempt to forecast what developments might take place, especially in the area of strict liability in tort.

I. THE STANDARD

The history of strict liability in tort in Indiana began in federal court with the 1966 opinion of *Greeno v. Clark Equipment Co.*[2] Anticipating a "forward looking [Indiana Supreme] Court," Judge Eschbach stated that section 402A of the *Restatement (Second) of Torts* was the law of Indiana.[3] Since *Greeno*, many Indiana lower court decisions have expressed opinions as to what the Indiana Supreme Court would consider the law of strict liability in tort to be. Only twice has the Indiana Supreme Court considered cases involving strict tort liability and both times the cases were decided on procedural grounds without discussion of the substantive law.[4]

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The author thanks his colleague, Mary Runnello, for her helpful assistance in the preparation of this article.

[1]The names and positions of the distinguished speakers are enumerated in the introduction to this Symposium.

[2]237 F. Supp. 427 (N.D. Ind. 1965).

[3]*Id.* at 433.

[4]Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 358 N.E.2d 974 (Ind. 1976), *rev'g* 332 N.E.2d 820 (Ind. Ct. App. 1975) (aff'd new trial on basis of motion to correct errors). Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973) (aff'd leave to amend plaintiff's complaint so as to bring it into conformity with evidence).

In most jurisdictions, it is well established that strict liability in tort is based upon different grounds from either negligence or warranty law.[5] Strict liability in products cases developed to relieve plaintiffs of unduly burdensome problems of proof, thus furthering social and economic beliefs that the economic burden should not be borne solely by injured parties.[6] Although strict liability is well established as a theory of recovery, one of the key issues today is how it differs from other theories of liability, especially negligence.[7]

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[5]For a fairly comprehensive listing of jurisdictions adopting some form of strict liability in tort, *see* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3], at 3-248 n.2 (Supp. 1976). *See also* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 804-05 n.3 (1976). For those jurisdictions adopting section 402A and its accompanying comments, it is clear that comments a, b, c, d, f and m are describing an action which differs from both negligence and warranty or sales law. *See also* Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 269 (1976). [hereinafter cited as Vargo, *1976 Survey*].

[6]As is now well documented, two individuals had a great hand in the development of strict liability in tort—Dean William Prosser and Justice Roger Traynor. A glance at Justice Traynor's great California decisions and Dean Prosser's articles should convince most readers that strict liability in tort was to a great extent based upon the desire to relieve the plaintiff from overharsh burdens of proof and economic hardships placed upon him by the disastrous consequences of injuries caused by defective products. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966). Dean Prosser as Editor and Justice Traynor as one of his advisors initiated the *Restatement's* interpretation of strict liability in § 402A. Comment c to § 402A reflects some of the policy reasons behind strict liability. For an overview of more recent economic policies behind strict liability in tort, see Vargo, *1976 Survey, supra* note 5. In addition to Dean Prosser's and Justice Traynor's view it has been stated that considerations of frustration of consumer expectations and an incentive for manufacturers to make safer products weigh heavily in the decision to adopt strict liability in tort. *See* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 339-40 (1974).

[7]*See* Phillips, *The Standard for Determining Defectiveness in Product Liability*, 46 U. CIN. L. REV. 101 (1977); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977); Montgomery & Owen, *supra* note 5, at 824-46; Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?* 42 TENN. L. REV. 123 (1974); Wade, *On The Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 841 (1973) [hereinafter cited as Wade, *Nature of Strict Tort Liability*]. A good example of the struggle to differentiate between negligence and strict tort liability is found in the decisions of the Oregon Supreme Court. In Anderson v. Klix Chem. Co., 256 Or. 199, 472 P.2d 806 (1970), the court stated that there was no difference between strict tort liability and negligence in a warning case. Later in Phillips v. Kimwood Mach. Co., 269 Or. 485, 497-98, 525 P.2d 1033, 1039 (1974), the court overruled *Anderson* and recognized the differences between the doctrine of negligence and strict liability in tort.

It is generally accepted that negligence is based upon unreasonable conduct of the defendant, whereas strict liability in tort looks toward the condition of the product, ignoring the actual conduct of the defendant.[8] Thus, strict liability centers on whether or not the product is defective and not whether the defendant's conduct was unreasonable in making the product defective. Indiana is in accord with other jurisdictions in holding that a product may be considered defective in one of three ways: mismanufacture, misdesign, or failure to give proper instructions or warnings.[9]

Merely stating how a product may be found defective, however, does not resolve the question of what standard is to be used to measure its defectiveness. As both Professor Jerry Phillips and Dean John Wade state, there does not seem to be any problem when a product is mismanufactured: the product as produced is different from that which was intended by the manufacturer. In that case, liability will attend upon proof that the defect caused the plaintiff's injury.[10] Substantial problems arise, however, in cases alleging design defects and defects resulting from inadequate warnings and instructions. In these cases, some courts view the issue as transferring from the condition of the product to whether the designer or manufacturer has supplied a proper design or given proper information concerning the condition of the product.[11] That is, a design defect challenges the designer in producing a product that is free of any defect arising from the manufacturing process, since a perfectly manufactured product may have a propensity to cause harm as designed, whereas a product differently designed may not have caused harm. Similarly, a product which has no manufacturing defect or design defect may still be considered defective if the seller or manufacturer fails properly to instruct the user concerning the product's uses or warn of the inherent dangers present in the product.[12] Because the strict liability cases concerning design, warning, and instruction defects appear to be looking toward the conduct of the defendant rather than the condition of the product, many courts state that these issues are better resolved under negligence rather

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[8]*Id. See also* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

[9]*See* Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108, 110 (7th Cir. 1976); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 825 (Ind. Ct. App. 1975).

[10]*See* authorities cited in note 7 *supra*.

[11]*Id.*

[12]*See* Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 IND. L. REV. 395, 409 (1976). *See generally* authorities cited in note 7 *supra*.

than strict liability theory.[13] This position is questionable, however, since the theory of strict liability was based at least in part upon the desire to overcome plaintiffs' problems of proving negligence and upon society's demand that the manufacturer bear more of the risk involved in defective products.[14] If strict liability is to accomplish its goals, a standard other than negligence should be considered in the design and warning cases.

At least two lines of thought have been advanced as to the type of standard to be used in strict liability in tort. The first standard is negative in form, generally stating what the standard is not. The second is positive, setting out a formula both for the court and for the jury in strict liability cases. The negative approach was first enunciated in California in *Cronin v. J. B. E. Olsen Corp.*[15] *Cronin*, a "second collision case," rejected the *Restatement* version of strict liability because it used the words "unreasonably dangerous," on the ground that such language smacked of negligence.[16] The *Cronin* court found that section 402A of the *Restatement* departed from the rule stated in *Greenman v. Yuba Power Products*,[17] since any reference to negligence principles is antithetical to strict liability.[18] Strict liability is based upon non-fault principles geared toward the product, while negligence is a fault principle geared toward the conduct of the defendant. The *Cronin* court was not simply indulging in idle semantics, for it stated that the standard of strict liability in tort for both mismanufacture and design defect cases was to be identical.[19] Thus *Cronin* set forth the principle that California would have a single standard, different from negligence, in determining what was necessary to establish a defect in a product. However, the *Cronin*

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[13]An excellent list of authorities both supporting and rejecting the proposition that design defects and defects arising from a failure to warn or instruct are best resolved on negligence principles can be found in Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1975).

[14]*See* authorities cited in note 6 *supra*.

[15]8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[16]*Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

[17]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[18]*Id.* The exact language used by the *Cronin* court was:

> Of particular concern is the susceptibility of Restatement section 402A to a literal reading which would require the finder of fact to conclude that the product is, first, defective and, second, unreasonably dangerous. (Note, *supra*, 55 Geo. L.J. 286, 296.) A bifurcated standard is of necessity more difficult to prove than a unitary one. But merely proclaiming that the phrase "defective condition unreasonably dangerous" requires only a single finding would not purge that phrase of its negligence complexion. We think that a requirement that a plaintiff also prove that the defect made the product "unreasonably dangerous" places upon him a significantly increased burden and represents a step backward in the area pioneered by this court.

8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

[19]*Id.* at 134, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.

court failed to set forth what the standard should be and merely stated what it was not. The *Cronin* reasoning was subsequently followed by New Jersey in *Glass v. Ford Motor Co.*[20] and Pennsylvania in *Berkebile v. Brantly Helicopter Corp.*[21]

The second approach to establishing a standard for strict liability cases was proffered by Dean John Wade[22] and Dean Page Keaton.[23] This Wade/Keaton standard states that the primary difference between negligence and strict liability in tort is one of knowledge or scienter. Professor Wade contends that in strict liability cases knowledge of the injuring defect should be imputed to the manufacturer or seller, and the issue then becomes one of whether the manufacturer or seller would have been negligent for marketing the product with such knowledge.[24] Professor Wade's imputed knowledge approach is best exemplified by *Phillips v. Kimwood Machine Co.*[25] wherein Justice Holman, speaking for the Oregon Supreme Court, recognized that unreasonably dangerous defects in products come from two principal sources: mismanufacture or faulty design.[26] In defining a test for a defect in the product, the *Phillips* court stated:

> A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.* The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved.* Strict liability imposes what amounts to constructive knowledge of the condition of the product.[27]

Justice Holman, discussing warning defects, stated:

> In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warn-

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[20]123 N.J. SUPER. 599, 304 A.2d 562 (Super. Ct. 1973). The *Glass* case has been seriously questioned. *See* Brody v. Overlook Hosp., 66 N.J. 448, 332 A.2d 596 (1975); Turner v. International Harvester Co., 133 N.J. SUPER. 277, 336 A.2d 62 (Law. Div. 1975).

[21]462 Pa. 83, 337 A.2d 893 (1975). The efficacy of *Berkebile* has been brought into question by several federal court decisions which generally follow the case of Beron v. Kramer-Trenton Co., 402 F. Supp. 1268 (E.D. Pa. 1975), the latest being Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85 (3d Cir. 1976); Schell v. AMF, Inc., 422 F. Supp. 1123 (M.D. Pa. 1976).

[22]Wade, *Nature of Strict Tort Liability, supra* note 7, at 836-38.

[23]Keeton, *Product Liability and The Meaning of Defects*, 5 ST. MARY'S L.J. 30, 38 (1973).

[24]Wade, *Nature of Strict Tort Liability, supra* note 7, at 834.

[25]269 Or. 485, 525 P.2d 1033 (1974).

[26]*Id.* at 491, 525 P.2d at 1035.

[27]*Id.* at 492, 525 P.2d at 1036 (footnotes omitted).

> ing, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it.[28]

Judge Holman also considered the roles of the court and jury in products cases. He found that the same process is used in the doctrines of negligence, ultra hazardous, and strict liability—the utility of the article is weighed against the risk of its use.[29] Thus, Judge Holman generally agreed with Professor Wade as to the factors to be considered in determining whether a case should be submitted to the jury. After it has been determined that a case is appropriate for jury consideration, the proper instruction to be given to the jury is as follows:

> [T]he law imputes to a manufacturer (supplier) knowledge of the harmful character of its product whether he actually knows of it or not. He is presumed to know of the harmful characteristics of that which he makes (supplies). Therefore, a product is dangerously defective if it is so harmful to persons (or property) that a reasonable, prudent manufacturer (supplier) with this knowledge would not have placed it on the market.[30]

Thus, Professor Wade's standard for defectiveness in strict liability cases seems to have practical application, at least according to the Oregon Supreme Court.

Although no Indiana case has discussed either the Wade/Keaton standard or the *Cronin* approach concerning strict liability in tort, several Indiana cases have discussed the problems associated with defects arising from the design and failure to warn or instruct.[31]

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[28] *Id.* at 498, 525 P.2d at 1039.

[29] *Id.*

[30] *Id.* at 501 n.16, 525 P.2d at 1040 n.16.

[31] Several cases in Indiana have discussed the issue of problems associated with design defects. *See* Latimer v. General Motors Corp., 535 F.2d 1020 (7th Cir. 1976); Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976); Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); Zahora v. Harnischfeger Corp., 404 F.2d 172 (7th Cir. 1968); Indiana Nat'l Bank v. Delaval Separator Co., 389 F.2d 674 (7th Cir. 1968); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1967); Huff v. White Motor Corp., 418 F. Supp. 233 (S.D. Ind. 1976); Karczewski v. Ford Motor Co., 382 F. Supp. 1346 (N.D. Ind. 1974); Schemel v. General

Although the Indiana decisions in these areas are not consistent, certain trends can be ascertained from the framework of these cases. The reader is forewarned that conflicts will appear between the federal and state cases and even among different districts or judges within the same court.

II. Design Defect—The Second Collision Theory And The Blind Court

The history of Indiana design defect cases in products liability is dominated by the Seventh Circuit opinion in *Evans v. General Motors Corp.*,[32] wherein Judge Knock rejected plaintiff's argument that the defendant auto manufacturer should be held to a duty of reasonable care and reasonable foresight in the design of its auto to lessen the severity of its passengers' injuries in the event of a collision. Although the *Evans* case was brought under theories of negligence, warranty, and strict liability in tort,[33] the manner in which plaintiff requested relief sounded as if it were merely a request for reasonable care and foresight as in any negligence case.[34] The *Evans* court rejected plaintiff's arguments over a well-reasoned and vigorous dissent by Judge Kiley.[35] In doing so the majority emphasized that the alleged defect in the auto did not cause the accident, that the manufacturer should not be held to a duty to make a perfect, accident-free automobile, and rejected any reasonable foreseeability argument by stating that the intended use of an automobile does not include participation in collisions with other objects.[36] The *Evans* doctrine was reinforced by Judge Knock in *Schemel v. General Motors Corp.*[37] *Schemel* not only followed the

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Motors Corp., 261 F. Supp. 134, *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); J.I. Case Co. v. Sandefur, Inc., 245 Ind. 213, 197 N.E.2d 519 (1964). A few Indiana cases have discussed failure to warn or instruct. *See* Reliance Ins. Co. v. AL E. & C. Ltd., 539 F.2d 1101 (7th Cir. 1976); Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976); Downey v. Moore's Time-Saving Equip., Inc., 432 F.2d 1088 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969), *cert. denied*, 396 U.S. 940; Eck v. E.I. DuPont De Nemours & Co., 393 F.2d 197 (7th Cir. 1968); Indiana Nat'l Bank v. DeLaval Separator Co., 389 F.2d 674 (7th Cir. 1968); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 974 (Ind. 1976); Link v. Sun Oil Co., 312 N.E.2d 126 (Ind. Ct. App. 1974); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[32]359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1967).

[33]*Id.* at 823.

[34]*Id.* at 824.

[35]*Id.* at 825.

[36]*Id.*

[37]261 F. Supp. 134 (S.D. Ind. 1966), *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

Evans doctrine, but also further emphasized that the manufacturer of a product is not an insurer and has a duty only to avoid hidden defects or concealed dangers in its product.[38] In addition, the *Schemel* court stated that a manufacturer is not bound to anticipate and guard against "grossly careless misuse of its product."[39]

Almost a decade after *Evans* and *Schemel*, the Seventh Circuit reaffirmed their holdings in *Latimer v. General Motors Corp.*[40] Judge Swygert left no doubt that in his opinion strict liability does not require a manufacturer to be aware of the environment in which he places his product, or to foresee or anticipate a misuse of his product and design appropriate safeguards.[41] Again, the court emphasized that a manufacturer is not an insurer of his products and is not obligated to produce accident proof machines, but has a duty only to avoid hidden defects or concealed dangers.[42]

The *Evans* rationale was extended in the latest federal case, *Huff v. White Motor Corp.*[43] There, Judge Steckler found that the plaintiff could not recover for enhanced injuries (death) when a tractor overturned and its fuel tank caught on fire. The plaintiff alleged that the fire resulted from a defectively designed fuel tank, and that absent such a design defect, the injuries to the plaintiff would have been less severe. Judge Steckler rejected plaintiff's argument that the *Evans* rationale applied only in negligence cases, not in strict liability cases, and invoked stare decisis to deny recovery. In doing so, he reasoned that the intended purpose doctrine applies in strict liability in tort because of section 402A's requirement that the product be unreasonably dangerous to the user. In Judge Steckler's mind, a product cannot be unreasonably dangerous if the defect does not cause the accident in question.[44]

After this Article went to press, the Seventh Circuit Court of Appeals reversed the trial court in *Huff*, and expressly overruled *Evans* and *Schemel*.[45]

III. Intended Use And Foreseeability

The *Evans* decision rested upon two major fallacies—intended use and obvious danger. *Evans* stated that although collisions are

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[38]384 F.2d at 805.

[39]*Id.*

[40]535 F.2d 1020 (7th Cir. 1976).

[41]*Id.* at 1023-24.

[42]*Id.*

[43]418 F. Supp. 232 (S.D. Ind. 1976).

[44]*Id.* at 233.

[45]Huff v. White Motor Corp., No. 76-2086 (7th Cir. Oct. 4, 1977). The court determined that, in light of the adoption of section 402A of the *Restatement (Second) of Torts* by the Indiana courts, the *Evans* doctrine would no longer be followed by Indiana courts.

foreseeable, the intended use of an automobile does not include these foreseeable collisions.[46] This outmoded rationale views *intended use* as a subjective test of what a manufacturer will tolerate as a use of his product. The concept originated in 1916 in *MacPherson v. Buick Motor Co.*,[47] and was later translated into section 395 of the *First Restatement of Torts*.[48] It soon became obvious that the *MacPherson* intended use concept in *negligence law* was too narrow, and it was replaced by an objective test requiring the manufacturer to foresee or anticipate certain uses of his product.[49] That is, the manufacturer is required as an element of foreseeability to be aware of the environment in which he places his product. This objective foreseeability test, best exemplified in *Spruill v. Boyl Midway, Inc.*,[50] was adopted in section 395 of the *Restatement (Second) of Torts*. Indiana, however, through *Evans* and its progeny, has not only clung to the intended use concept in negligence, but has also grafted it onto strict liability in tort. This puzzling stubbornness can perhaps be explained either as allegiance to stare decisis or sympathetic attitude to manufacturers.

The courts' protective attitude toward business is evident in the method used to reach the result—the *Evans* court first inflated plaintiff's contentions, then destroyed them. The plaintiff in *Evans* did not ask for a perfect, foolproof vehicle capable of withstanding all types of collisions, but rather requested that the manufacturer design his car in such a way that injuries would not be enhanced in foreseeable collisions.[51] Yet the *Evans* court sua sponte created a straw man that demanded "foolproof" or "accident proof" vehicles.[52] Not being content with destroying that illusionary demand, the court repeatedly emphasized that the alleged defect did not cause the original collision, conveniently overlooking the fact that plaintiff sought damages only for those injuries which were enhanced by the alleged design defect, not for the injuries caused only by the original collision.[53]

The second fallacy underlying the *Evans* decision is the so-called "obvious danger rule" which is best exemplified by the 1950 New York case of *Campo v. Scofield*,[54] a negligence case heavily relied

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[46]*See* text accompanying note 36 *supra*.

[47]217 N.Y. 382, 111 N.E. 1050 (1916).

[48]RESTATEMENT OF TORTS § 395 (1934). Comment c and the illustration which follows describe the intended purpose rationale.

[49]When the *Restatement (Second) of Torts* was written, the intended purpose doctrine was changed to include foreseeability. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965), especially comment b.

[50]308 F.2d 79 (4th Cir. 1962).

[51]*See* text accompanying note 34 *supra*.

[52]359 F.2d at 824.

[53]*Id.* at 823-24.

[54]301 N.Y. 468, 95 N.E.2d 802 (1950).

upon by the *Evans* court.[55] *Campo* will be discussed at length later in this Article.[56] Suffice it to say at this point that it seems inappropriate at best that the Seventh Circuit continues to rely upon outdated negligence principles, particularly since recent Indiana cases have evinced a more realistic view of the consumer-manufacturer relationship. For example, in a federal district court case, *Karczewski v. Ford Motor Co.*,[57] Judge Sharp stated: "There is no question that the particular purpose of a passenger automobile is to drive on the public streets and highways safely without uncontrolled unsafe behavior. Certainly, an automobile is impliedly warranted for that purpose."[58]

Judge Lowdermilk of the Indiana Court of Appeals was even more emphatic in *Gilbert v. Stone City Construction Co.*[59] He defined the "consumer expectation test" as a standard for a defect in Indiana as follows: "The prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety . . . ."[60]

Gilbert held that users have a reasonable expectation that suppliers will provide safety devices to protect against design-created dangers, and that lack of safety devices to guard against foreseeable mishaps may constitute defective design.[61] The question of whether a given omission does constitute a defect is a factual determination for the jury.[62]

The conflicts between the *Evans* doctrine as expressed in *Huff* and *Latimer* and the reasonable foreseeability standard of *Gilbert* are irreconcilable. Whereas *Gilbert* uses a consumer expectation test, *Evans* uses a subjective test that bars recovery when the use of the product is neither intended nor *actually* foreseen by the manufacturer. *Evans* and its progeny state that as a matter of law a manufacturer has no duty to foresee the handling and use of his product, whereas *Gilbert* requires the manufacturer to use reasonable foreseeability, and to anticipate the use of his product. Although, *Gilbert* does not address the second collision issue which was central in *Evans*, it is clear that a manufacturer has an obligation to provide feasible safety features to eliminate dangers arising from foreseeable uses. In 1970, the Seventh Circuit used the same rationale used in *Gilbert* in a non-automobile context in *Filler v.*

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[55]The *Evans* case cites *Campo* for the "obvious danger rule." *See* Evans v. General Motors Corp., 359 F.2d at 824.

[56]*See* text accompanying notes 88-111 *infra*.

[57]382 F. Supp. 1346 (N.D. Ind. 1974).

[58]*Id.* at 1351.

[59]357 N.E.2d 738 (Ind. Ct. App. 1976).

[60]*Id.* at 743.

[61]*Id.* at 744.

[62]*Id.* at 745.

Rayex Corp.[63] Without mentioning *Evans*, the court cited *Spruill* for the proposition that the manufacturer-seller must anticipate the reasonably foreseeable risk in the use of his product.[64]

The continued vitality of the *Evans* and *Huff* approach of using negligence and even prenegligence concepts in section 402A cases is in direct conflict with *Gilbert*, *Filler*, and *Karczewski*. As Judge Sharp stated in *Karczewski*:

> The Ford Motor Company devotes much attention to a discussion of express warranty and puts several eggs in the basket provided in *Blunk v. Allis Chalmers Manufacturing Company*. *Blunk* is no salvation to Ford for at least two reasons. First, this case was not submitted on express warranty. Second, *Blunk* represents pre-strict liability case law in Indiana and for that additional reason has no application here.[65]

The unnecessary judicial blindness arising from the elimination of foreseeability and reasonableness in *Evans* has no place in strict liability, or even negligence cases, and should be eliminated.

IV. Failure To Warn

The second type of defect, failure to warn, is conceptually closely related to defective design. Indiana's ready acceptance of liability for failure to warn thus presents another anomaly vis-a-vis *Evans*. Failure to warn was succinctly described in *Sills v. Massey-Ferguson, Inc.*,[66] where a non-user or "bystander" was injured by a stone thrown from the blades of a lawn mower manufactured, designed, and sold by the defendant. Plaintiff brought his action in negligence, warranty, and strict liability in tort, alleging negligent design, a design defect, and failure to warn of a foreseeable risk.[67] Judge Eschbach found that the question of defect and failure to warn are closely related issues:

> [T]he court has held that the defendant owed plaintiff a duty not to put on the market a product in a defective condition unreasonably dangerous to him. It would appear that there are essentially two ways that a manufacturer may discharge this duty. The first is to make a product that is safe. The second is to make a product which may present some danger but in such case to give an *effective* warning of the danger

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[63] 435 F.2d 336 (7th Cir. 1970).
[64] *Id.* at 338.
[65] 382 F. Supp. at 1351.
[66] 296 F. Supp. 776 (N.D. Ind. 1969).
[67] *Id.* at 778.

> to those who foreseeably will be affected by it. In this connection, a "perfectly" made product may be defective in the legal sense if it is unreasonably dangerous in the absence of a warning.[68]

That is, a manufacturer has a duty to place a "safe product" on the market, either by making its product completely safe, or by giving an "effective" warning regarding dangers which cannot practically be removed. Failure to do one or the other renders the product unsafe or defective, and subjects the manufacturer to liability for any resulting injury. Whether the defendant should have warned the plaintiff of dangers in the product is a question for the jury.[69]

A particularly revealing statement is made in *Sills* regarding assumption of risk (incurred risk): "The rationale underlying the warning concept is that a person who is injured by a product in spite of his receiving an effective warning about its dangers is deemed to have incurred the risk and consequently may not recover for his injuries."[70] It is reasonable to conclude from this statement that any injury resulting from a manufacturer's failure to warn will result in liability unless the manufacturer can prove all of the elements of assumption of risk.[71] The only standard offered by *Sills* as to what would constitute an effective warning was that it must apprise the user of the danger at hand. Moreover, the warning need not necessarily be given directly to the user if it is given to a person "in a position such that he may reasonably be expected to act so as to prevent the danger from manifesting itself."[72]

The failure to warn concept first appeared in an Indiana state court in *Perfection Paint & Color Co. v. Konduris.*[73] There, Judge Pfaff said that when a product is more dangerous than is contemplated by the ordinary user, the manufacturer owes a duty to warn of the product's dangers.[74] Any use of the product in contravention of adequate warning would result in assumption of the risk.[75] The *Sills/Perfection* concept of a product being defective when the manufacturer fails to give adequate warnings was followed

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[68]*Id.* at 782.

[69]*Id.* at 778-79.

[70]*Id.* at 782-83.

[71]For a discussion of the elements of assumption of the risk or incurred risk—actual knowledge, understanding and appreciation of a risk with a viable choice or alternative to said risk—*see* Vargo, *1976 Survey, supra* note 5, at 272 n.29; Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law,* 9 IND. L. REV. 270, 279 n.48 (1975) [hereinafter cited as Vargo, *1975 Survey*].

[72]296 F. Supp. at 783.

[73]147 Ind. App. 106, 258 N.E.2d 681 (1970).

[74]*Id.* at 120, 258 N.E.2d at 689.

[75]*Id.*

by the Indiana Court of Appeals in *Link v. Sun Oil Co.*,[76] where the court approved instructions on the failure to warn issue, but refused to find the defendant liable because the proof was insufficient.[77]

The most notable decision concerning failure to warn is *Nissen Trampoline Co. v. Terre Haute First National Bank.*[78] Although the court of appeals decision was reversed on procedural grounds by the Indiana Supreme Court,[79] that decision is the most recent statement of an Indiana appellate court's view of failure to warn, and as such calls for close study. The most interesting aspect of the court of appeals decision is its recognition that failure to warn cases present a serious causation problem. The plaintiff, who has the burden of proving causation, is put in an impossible position when the manufacturer gives no warning, since the plaintiff must then show that "but for" the absent warning, plaintiff would not have been injured.[80] That is, plaintiff is forced into the position of showing that he would have heeded an adequate warning if one had been given. To overcome this problem the *Nissen* court followed the lead of the Texas Supreme Court in *Technical Chemical Co. v. Jacobs*,[81] which shifted the burden of causation by creating a rebuttable presumption that plaintiff would have heeded a sufficient warning. This device was subsequently used in *Gilbert*, which held that the lack of safety devices could constitute a defective condition.[82] Adopting the *Nissen* rule, the *Gilbert* court said that the plaintiff, a bystander who was injured by a rolling machine lacking an audible signal, would have heeded any such audible warning if one had been given.[83]

Rounding out the scope of the manufacturer's duty to warn, the Seventh Circuit Court of Appeals in *Reliance Insurance Co. v. AL E. & C. Ltd.*,[84] stated that once an obligation to warn has arisen it is

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[76]312 N.E.2d 126 (Ind. Ct. App. 1974).

[77]The trial court's instruction was:

> The word 'defect' as used in these instructions, refers not only to the condition of the product itself, but may include as well the failure to give directions or warnings as to the use of the product in order to prevent it from being unreasonably dangerous. If directions or warnings as to the use of a particular product are reasonably required in order to prevent the use of such product from becoming unreasonably dangerous, the failure to give such warnings or directions, if any, renders the product defective, as that word is used in these instructions.

Id. at 128-29.

[78]332 N.E.2d 820 (Ind. Ct. App. 1975).

[79]358 N.E.2d 974 (Ind. 1976).

[80]For a description of the causation problem involved in *Nissen*, *see* Vargo, *1976 Survey*, *supra* note 5, at 277-78.

[81]480 S.W.2d 602 (Tex. 1972).

[82]357 N.E.2d at 745.

[83]*Id.*

[84]539 F.2d 1101 (7th Cir. 1976).

considered a non-delegable duty. Citing *Berkebile v. Brantly Helicopter Corp.*,[85] the court stated:

> The sole question . . . is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe. *This is for the jury to determine. The necessity and adequacy of warnings in determining the existence of a defect can and should be considered with a view to all the evidence.* The jury should view the relative degrees of danger associated with the use of the product since a greater degree of danger requires a greater degree of protection.
>
> Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risk and inherent limits of the product. *The duty to provide a non-defective product is non-delegable.*[86]

Although it has not been overruled, the *Evans/Huff/Latimer* line of cases has been undermined by the *Sills/Nissen/Reliance* line. Viewed as a whole, these latter cases offer the following standard for warning cases: A product may be considered defective if the manufacturer fails to warn of a product's dangers which he cannot reasonably render safe. Any issue of whether the manufacturer should warn is a question to be resolved by the jury. The warning must be adequate and must reach the ultimate user, since the duty to warn is non-delegable. If the warning is given, failure to heed an adequate warning is considered to be within the ambit of the defense of assumption of risk, with the burden of proving all elements on the defendant. If no warning is given, there is a rebuttable presumption that the plaintiff would have heeded said warning.

V. Obvious Danger, Latent Versus Patent, Foreseeability, Knowledge, and Choice of Materials—Should These Affect the Standard of Warning Cases?

The failure to warn cases just discussed, *Sills* through *Reliance*, standing alone express a rather comprehensive basis for understanding Indiana law. However, a completely separate line of cases has developed that at best is difficult to square with the *Sills* rationale.

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[85]462 Pa. 83, 337 A.2d 893 (1975). *See* discussion in note 21 *supra*.

[86]539 F.2d at 1106.

This second line of cases began with dictum in *J. I. Case v. Sandefur*, which cited *Campo v. Scofield*, a 1950 New York case.[87] *Campo* described the archaic "limited duty" concept that as a matter of law a plaintiff cannot recover if injury-causing dangers contained in a product are obvious, or patent.[88] *Campo* came under vigorous and well-deserved attack in the late 1950's by Harper and James as a remnant of a prenegligence concept which has no place in modern negligence law.[89] Although New York eventually overruled *Campo*[90] under the fire of adverse criticism,[91] Indiana has continued to espouse the *Campo* concept, albeit mostly in dicta.[92] At least ten Indiana cases (*Nissen* included) have stated that in order for plaintiff to recover he must have been unaware of the dangers in the product[93]—stated differently, if the danger or defect in the product is "obvious" or "patent," then as a matter of law there can be no liability. The creation of this objective standard in the obvious danger rule flies in the face of the subjective posture of assumption of the risk.[94] This extension of an archaic prenegligence concept to strict liability in tort contradicts the premises of strict liability, in that it offers a reward to the manufacturer who makes a blatantly unsafe product—no liability attaches since the defect is exposed.[95]

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[87]245 Ind. at 222, 197 N.E.2d at 523, *citing* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[88]For criticism of this approach, *see* Vargo, *1976 Survey*, *supra* note 5, at 279-83.

[89]*See* 2 F. HARPER & F. JAMES, LAW OF TORTS § 28.5, at 1542 (1956).

[90]Micallef v. Miehle Co., 39 N.Y.2d 376, 385, 384 N.Y.S.2d 115, 121, 348 N.E.2d 571, 577 (1976).

[91]*Id.* at 383-85, 384 N.Y.S.2d at 120-21, 348 N.E.2d at 575-77.

[92]For a history of the *Campo* rule as cited in Indiana cases, *see* Vargo, *1976 Survey*, *supra* note 5, at 280 n.61.

[93]*Id.*

[94]The fact that a danger is obvious does not mean that the plaintiff has actual understanding or appreciation of the risk, nor does it indicate whether he had an adequate choice, all of which are necessary elements for the plaintiff to have incurred the risk involved. *See* authorities cited in note 71 *supra*.

[95]As the court stated in Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972):

> Furthermore, the policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Requiring the defect to be latent would severely limit the cases in which the financial burden would be shifted to the manufacturer. It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while

The cases espousing the obvious danger rule have offered two further rationales for denying recovery to plaintiffs injured by a product. The first is that the manufacturer has a right to use whatever materials he chooses to make his product, and the second is that the manufacturer must be endowed with superior knowledge concerning the qualities of his product before the plaintiff may recover. In *Indiana National Bank v. DeLaval Separator Co.*,[96] a negligence case, the court stated that the manufacturer has a duty to warn of dangers of which he has actual or constructive knowledge, but has no duty to warn of obvious dangers. In answer to plaintiff's contention that the product could have been made safer if the manufacturer had used different materials, the *DeLaval* court said that "a manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing its product," citing *Sandefur* as authority.[97] However, the *Sandefur* opinion actually states:

> A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing an "economy model," as compared with a luxury model—the life of one being much less than the life of the other. Yet there are reasonable limits on such "economy," for example: a machine may not be built with extremely weak or flimsy parts concealed by an exterior such as to mislead a user into believing it safe and stable when, in fact, it is not, thus causing a user to rely thereon, to his injury.[98]

There is no doubt that under either negligence or strict liability in tort a manufacturer *may* choose whatever materials he desires in making his product. However, it is also true that under either negligence or strict liability the manufacturer *may* be held liable for any unreasonableness in his choice of materials. The issue is not one of deprivation of choice but of reasonableness of choice.

The same holds true for choice for design. The manufactuerer-defendant in *Posey v. Clark Equipment Co.*[99] made two types of forklifts. One was for use in areas where items would be lifted above the driver's head, and had a safety device above the driver to protect him from falling objects. The other, for use in "low stacked

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subjecting to such liability those who innocently market products with latent defects.

8 Cal. 3d at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449 (citations omitted).

[96]389 F.2d 674 (7th Cir. 1968).

[97]*Id.* at 677.

[98]J.I. Case Co. v. Sandefur, 245 Ind. 213, 222-23, 197 N.E.2d 519, 523 (1964).

[99]409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969).

areas," had no such safety device. The plaintiff was injured while using a "low stack" forklift in a "high stack area" when items fell from above. The court denied liability on plaintiff's failure to warn theory because of the obvious danger rule and because plaintiff failed to prove that the manufacturer had superior knowledge of the dangers involved in the product.[100] Although superior knowledge as between the plaintiff and defendant concerning propensities of a product is probably relevant in the contract context of implied warranties for a particular purpose,[101] superior knowledge in negligence or strict liability in tort cases should not *as a matter of law* rule out the possibility of finding the defendant liable for a defective product.

Further problems of the obvious danger rule are illustrated in *Burton v. L. O. Smith Foundry Products Co.*[102] In that case a hose carrying a flammable compound was severed, spraying and burning the plaintiff-decedent, who was working on the machine containing the hose. In holding that the manufacturer of the compound was not liable for the plaintiff's injuries, Judge Stevens said that: "[A] duty to warn exists only when those to whom the warning would go can reasonably be assumed to be ignorant of the fact which a warning would communicate. If it is unreasonable to assume they are ignorant of those facts, there is no duty to warn."[103]

The court based its conclusion of no liability on its finding that it is common knowledge that kerosene, with which the compound was mixed, is flammable. It was irrelevant to the *Burton* court that the compound was not mixed by the plaintiff and others working with the machine, who therefore had no knowledge of the flammability of the compound, since the manufacturer of the compound had no control over the workspace around the machine and thus could not post warnings.

The most obvious problem with this analysis is that it conflicts with *Reliance Insurance Co. v. AL E. & C. Ltd.*[104] which states that the duty to warn is non-delegable, and that a warning must go to the ultimate user.[105] Although the compound manufacturer in *Burton* could not post warnings, it could have either made the product safe or taken it off the market. Judge Eschbach said in *Sills* that if a manufacturer can not make a safe product it must provide effective

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[100] *Id.* at 563-64.

[101] The recognition of the differences between implied warranties which sound in contract and those which sound in tort is well-recognized in Indiana courts. *See* Noefes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976); *see also* Vargo, *1975 Survey, supra* note 71, at 274 n.27.

[102] 529 F.2d 108 (7th Cir. 1976).

[103] *Id.* at 111.

[104] 539 F.2d 1101 (7th Cir. 1976).

[105] *Id.* at 1106.

warnings.[106] The converse should also be true—if effective warnings cannot be given, then the product must be made safe.

A more subtle problem, the one at the heart of the obvious danger rule, is Judge Stevens' statement in *Burton* that "[i]f it is unreasonable to assume they are ignorant of those facts, there is no duty to warn."[107] This sentiment is often expressed in judicial opinions, usually accompanied by truisms such as everyone knows that sharp things cut and that gravity causes things to fall. This standard is appropriate only at this very low level of common knowledge. However, when discussing complex products objective assessments of "common knowledge" are out of place in strict liability in tort.[108] Thus as will be discussed in a later section,[109] the objective reasonable person test of contributory negligence has been eliminated from strict liability, leaving only the subjective assumption of risk defense that looks to the plaintiff's actual knowledge. It must be remembered, of course, that the manufacturer's obligation to provide a safe product is the prime consideration in strict liability in tort, and must always be considered, despite the state of plaintiff's knowledge.

VI. Substantial Change

Judge Hoffman attempted to throw further hurdles into plaintiffs' paths in *Cornette v. Searjeant Metal Products, Inc.*,[110] in which he stated that as part of plaintiff's burden of proof in section 402A cases, he must establish positive proof that no substantial change occurred in the product from the time it was sold. "[A]ny change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put, *is* a *substantial* change."[111]

Judge Sharp vigorously disagreed with Judge Hoffman, saying that comment g to section 402A is the accurate statement of plaintiff's burden of proof in strict liability.[112] According to Judge Sharp, comments g and p do not require that the plaintiff prove no change has taken place, since it is contemplated that some products will undergo changes after they leave the seller's hands.[113] Judge Sharp

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[106]296 F. Supp. at 782.

[107]529 F.2d at 111.

[108]*See* discussion in Vargo, *1976 Survey, supra* note 5, at 279-83. *See also* 2 F. Harper & F. James, Law of Torts § 28.5, at 1542 (1956).

[109]*See* text accompanying notes 140-68 *infra*.

[110]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[111]*Id.* at 54, 258 N.E.2d at 657.

[112]*Id.* at 62, 258 N.E.2d at 662.

[113]*Id.* at 62-63, 258 N.E.2d at 662-63.

defined the issue as: "whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes."[114] After a lengthy discussion of how a plaintiff could fulfill his burden of proof through circumstantial evidence,[115] Judge Sharp concluded that any change in the product not reasonably forseeable to the manufacturer is a *defense* available to the defendant, who has a burden of proving that defense.[116]

VII. Strict Construction

Judge Hoffman and Judge Sharp also had opposing views as to the standard of interpretation of section 402A. In *Cornette* Judge Hoffman stated:

> Our reading of § 402A, *supra*, and numerous cases of applying it, leads to the conclusion that it should be strictly construed and narrowly applied. The limitation on imposition of the doctrine should be fully invoked and 'strict liability' applied only in those cases which fully and fairly meet § 402A, *supra*, standards.[117]

In response to Judge Hoffman's "strict construction," Judge Sharp said:

> I have carefully read all of the citations of authority and cannot find one that suggests or justifies the above quoted statement. I do not believe that products liability cases based on strict tort liability should be 'strictly construed and narrowly applied' any more than products liability cases based on negligence, express warranty, or implied warranty. If a party is able to bring his case within the principles set forth within § 402A, then he is entitled to its benefits no more, no less. To attach the rider 'strictly construed and narrowly applied' upon the adoption of § 402A is to graft a condition upon such adoption that has not been present in the adoption of § 402A in any other jurisdiction to my knowledge. This will lead to undue confusion in the handling of strict tort liability cases in Indiana. Such condition is wholly unnecessary and undesirable in my view.[118]

Judge Garrard subsequently cited both Judge Hoffman and Judge Sharp in *Chrysler Corp. v. Alumbaugh*[119] concerning the

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[114] *Id.* at 64, 258 N.E.2d at 663.
[115] *Id.* at 63-67, 258 N.E.2d at 663-65.
[116] *Id.* at 67, 258 N.E.2d at 665.
[117] *Id.* at 53, 258 N.E.2d at 656.
[118] *Id.* at 56, 258 N.E.2d at 658.
[119] 342 N.E.2d 908, 915 (Ind. Ct. App. 1976).

"strict construction" policy, but refused to choose between them. Judge Sharp affirmed his opposition to Judge Hoffman's strict construction policy after his appointment to the federal bench in *Wicks v. Ford Motor Co.*,[120] stating that Judge Hoffman's viewpoint was not the law of the state of Indiana, but rather that his own opinion was the law.[121]

The Seventh Circuit Court of Appeals in *Reliance* refused to follow Judge Hoffman's "strict construction" of section 402A, stating that they were not impressed with such dictum.[122]

These rejections of the "strictly construed and narrowly applied" standard of interpretation of the *Restatement* are in accord with sound judicial principles. This language is commonly used in construing statutes, not common law.[123] Section 402A, like all restatement sections, is judge-made, not statutory law. In keeping with common law traditions, section 402A should be read broadly to fulfill the societal needs which created the doctrine.[124] As Judge Sharp stated: "No court anywhere has so construed any restatement section, and such a restrictive construction is not the law of Indiana."[125]

VIII. Sale, Seller and Stream of Commerce

Although strict liability in tort pursuant to section 402A applies to sellers of products, a commercial sale is not necessary for liability to attach. For example, in *Perfection Paint & Color Co. v. Konduris*,[126] the court rejected the defendant manufacturer's attempt to escape liability by asserting that the gratuitous transfer of the product to the plaintiff failed to meet the sale requirement of section 402A. In an exhaustive review of the sale requirement the court stated that a "sale" occurred when the seller placed the product on the market or injected the goods into the stream of commerce.[127] Relying partially on *Greeno*, the *Konduris* court reaffirmed the *Price v. Shell Oil Co.*[128] stream of commerce approach. The *Konduris* opinion was reaffirmed in *Link*, *Karczewski*, and *Gilbert*. *Gilbert* expanded the *Konduris* concept by stating that a commercial sale was not necessary—a defendant could inject a defective product into the stream of commerce by either a "sale, lease, bailment, *or other*

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[120]421 F. Supp. 104 (N.D. Ind. 1976).

[121]*Id.* at 106.

[122]539 F.2d at 1104.

[123]*See generally* 2A J. Sutherland, Statutes and Statutory Construction §§ 58.01-58.06 (4th ed. C. Sands 1973).

[124]*See* discussion in note 6 *supra*.

[125]421 F. Supp. at 106.

[126]147 Ind. App. 106, 258 N.E.2d 681 (1970).

[127]*Id.* at 113-17, 258 N.E.2d at 685-88.

[128]2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

means."[129] Electricity was brought under section 402A in *Petroski v. Northern Indiana Public Service Co.*,[130] in which the Indiana Court of Appeals stated that electricity is a product that can be sold within the meaning of section 402A. However, it will not be considered to have been placed into the stream of commerce until it has reached its destination and left the line under the control of the electric company.[131]

IX. Bystander Recovery

Another issue in strict liability is whether or not a nonuser or bystander may recover for injuries inflicted by defective products. The *Restatement* takes no stand concerning this issue.[132] The *Cronin* line of cases, beginning with the now famous *Greeman v. Yuba Power Products*,[133] resolves the problem by ignoring the *Restatement's* use of the language "consumer or user" and allows recovery by "any person"[134] injured by a defective product. In Indiana, the bystander problem was first addressed by Judge Eschbach in *Sills*. He held that a nonuser "bystander" could recover for injuries upon either of two grounds: either the bystander is a reasonably foreseeable party, or, irrespective of foreseeability, the bystander may recover because of the policy considerations of section 402A.[135] The first approach—the forseeability standard—is a negligence test going to the duty element. The second approach ignores foreseeability because it is so closely related to negligence, and opts for protection of bystanders for social and policy considertions.[136] The court in *Sills* did not find it necessary to choose between these two theories. However, the later Indiana Court of Appeals case, *Chrysler Corp. v. Alumbaugh*,[137] emphasized the negligence approach in allowing the bystander to recover.[138] The *Alumbaugh* opinion was subsequently reinforced in *Gilbert*. The *Alumbaugh/Gilbert* opinions demonstrate either the Indiana courts' propensity towards negligence concepts or a misunderstanding of strict liability in tort.[139]

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[129] 357 N.E.2d at 742 (emphasis added).
[130] 354 N.E.2d 736 (Ind. Ct. App. 1976).
[131] *Id.* at 747.
[132] Restatement (Second) of Torts § 402A, Comment o (1965).
[133] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
[134] 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. 697.
[135] 296 F. Supp. at 781.
[136] *Id.*
[137] 342 N.E.2d 908 (Ind. Ct. App. 1976).
[138] *See* Vargo, *1976 Survey*, *supra* note 5, at 266-76.
[139] *Id.*

X. The Defenses

Superficially it appears that the consideration of the standard to use to determine whether a product is defective is disassociated from the defenses allowable in strict liability. However, there is an integral relationship between the elements of plaintiff's prima facie case and the elements of the defenses. For example, the courts have alternately characterized the obvious danger rule as part of the defense of assumption of risk,[140] or as a part of plaintiff's case-in-chief, which he must disprove before the product can be considered defective.[141] In order to properly evaluate what standard for defectiveness Indiana courts may adopt, it thus becomes necessary to consider the defenses and bars to recovery in strict liability in tort. Generally, contributory negligence has been eliminated as a defense,[142] leaving only assumption of risk and misuse as defenses to strict liability.[143]

A. *Contributory Negligence*

The elimination of contributory negligence as a defense to strict liability in tort cases has been accepted in Indiana. For example, Judge Buchanan in *Gregory v. White Trucking & Equipment Co.*[144] made an exhaustive survey of law in other jurisdictions and concluded that contributory negligence is not a defense either to strict liability in tort or to implied warranties which sound in tort or in contract.[145] This conclusion is in accord with the rationale of strict liability, which is based upon non-fault principles.[146] Any application of contributory negligence would be a reversion to the fault or negligence principles. This elimination of contributory negligence from Indiana law should have simplified the defenses. However, the

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[140]*See generally* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[141]*E.g.*, Downey v. Moore's Time-Saving Equip., Inc., 432 F.2d 1088, 1091 (7th Cir. 1970).

[142]*See* Vargo, *1975 Survey*, *supra* note 71, at 278.

[143]The issue of exactly what constitutes defenses to strict liability in tort is unsettled. *See* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 Vand. L. Rev. 93 (1972); Noel, *Products Liability: Bystanders, Contributory Fault and Unusual Uses*, 50 F.R.D. 321 (1971). As an example of one judge's admission of some forms of contributory negligence being a defense when brought in under the guise of other names such as misuse, *see* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965). For a discussion of one viewpoint that misuse is in reality a causation issue, *see* Vargo, *1975 Survey*, *supra* note 74, at 280 n.49.

[144]323 N.E.2d 280 (Ind. Ct. App. 1975).

[145]*Id.* at 285-87.

[146]*See* Vargo, *1976 Survey*, *supra* note 5, at 265-76.

opposite result has been achieved through the adoption of a mutated assumption of risk defense and a "new vocabulary."

B. *Assumption of Risk*

Assumption of risk has been recognized as a defense to strict liability in Indiana since *Greeno*, wherein Judge Eschbach cited comment n to section 402A as the appropriate standard for incurring a known and appreciated risk.[147] Judge Eschbach in *Sills* cited *Stallings v. Dick*[148] in holding that assumption of risk is a factual issue for jury determination.[149] However, in *Downey v. Moore's Time-Saving Equip., Inc.*,[150] the Seventh Circuit Court of Appeals subsequently espoused the amazing rule that if the plaintiff had knowledge of the danger and appreciated it or should have knowledge and appreciation, he then assumed the risk. The *Downey* rule was later reinforced in *Cornette* in which the court, citing *Stallings*, a negligence case, stated:

> The doctrine of assumed or incurred risk ". . . is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, or *could be readily discernible by a reasonable and prudent man under like or similar circumstances.*"[151]

The *Stallings* definition is rather confusing, for the assumption of risk (incurred risk) rule as cited in *Stallings* was preceded by the statement that: "The courts have long recognized the doctrine of incurred risk and have distinguished it from the separate defense of contributory negligence."[152] The *Stallings* assumption of risk formula uses an objective reasonable person standard to test the plaintiff's knowledge and appreciation of the risk. This test is generally used to establish contributory negligence, not to establish assumption of risk.[153] Rather, to prove assumption of risk the defendant has the burden of proving that the plaintiff subjectively had actual knowledge, understanding, and appreciation of the risk, and was given viable choices in voluntarily undertaking such risk.[154] Thus, despite its facial recognition that contributory negligence and

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[147]237 F. Supp. at 429.
[148]139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1965).
[149]296 F. Supp. at 782.
[150]432 F.2d 1088, 1093 (7th Cir. 1970).
[151]258 N.E.2d at 657 (emphasis added).
[152]210 N.E.2d at 88.
[153]*See* Vargo, *1975 Survey*, *supra* note 71, at 279 n.48.
[154]*Id.*

assumption of risk are separate defenses, the *Stallings* court nonetheless failed to distinguish them in fact.

This meshing of contributory negligence and assumption of risk was harmless in *Stallings* since it was based upon negligence, so either contributory negligence or assumption of risk was available as a defense. However, the subsequent use of the *Stallings* formulation of assumption of risk in *Cornette* is erroneous, since the previously eliminated defense of contributory negligence is reinjected into the defense of assumption of risk. Furthermore, using the *Stallings* assumption of risk formula even in a *negligence* case is contrary to the statement in *Stallings* that assumption of risk and contributory negligence are separate defenses which should be distinguished. Indiana courts have no difficulty distinguishing contributory negligence from assumption of risk in other areas of law (*e.g.*, guest passenger cases) which eliminate contributory negligence as a defense.[155] The same should be true of strict liability in tort.

C. *The New Vocabulary—Abnormal Use, Unintended Use, and Misuse*

Since comparative fault is not available as a defense in Indiana, the only defenses available in negligence are contributory negligence and assumption of risk. With the elimination of contributory negligence as a defense in strict liability actions, assumption of risk would appear to be the only defense available. However, artful lawyering by defense counsel has led courts to adopt a new language which renames many elements of contributory negligence and assumption of risk, creating what are now considered viable bars to recovery under strict liability in tort. Chief among these newly created bars to recovery are abnormal use, unintended use, and misuse.

In negligence cases, abnormal use was considered to be the defense of contributory negligence, with the burden of proof on the defendant.[156] Unintended use as found in negligence law can be traced to *MacPherson v. Buick Motor Co.*[157] The *MacPherson* unintended use formulation was adopted by the *First Restatement of Torts*, and has been considered to be a subjective test of how the manufacturer actually desired his product to be used.[158] This subjective intended use concept was later transferred into a test of foreseeability.[159]

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[155]*E.g.*, Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943).

[156]Note, *Abnormal Use in the Strict Products Liability Case—The Plaintiff's Burden of Proof?*, 6 SW. U. L. REV. 661 (1974).

[157]217 N.Y. 382, 111 N.E. 1050 (1916).

[158]*See* note 48 *supra* and accompanying text.

[159]*See* note 49 *supra* and accompanying text.

Thus, the intended use concept was converted from subjective use as intended by the manufacturer to an objective foreseeability test as seen by the reasonable person. Significantly, foreseeability under negligence law is considered part of the duty element, and thus part of the plaintiff's burden of proof.[160] With the adoption of unintended use language, this duty concept has been carried into strict liability as part of plaintiff's burden of proof, despite the shift in emphasis from the manufacturer's duty or conduct to the condition of the product in strict liability in tort.

With this "new vocabulary" much of what had been supposedly eliminated with the discard of contributory negligence was transmuted into additional burdens on the plaintiff. For example, misuse in negligence law is considered part of contributory negligence and thus a defense, with the burden of proof on the defendant.[161] However, in strict liability some courts have interpreted misuse as a part of plaintiff's burden of proof in showing either a defect or causation. As the court said in *Greeno:*

> Neither would contributory negligence constitute a defense, although use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, 'misuse,' would either refute a defective condition or causation. 'Misuse' would include much conduct otherwise labeled contributory negligence and would constitute a defense. Incurring a known and appreciated risk is likewise a defense.[162]

Although *Greeno* stated that misuse was a "defense," it also stated that misuse could refute the elements of defect or causation, thus muddying the waters.

Judge Sharp, in a succinct concurring opinion in *Cornette* discussed the issues of burden of proof for both plaintiffs and defendants in strict liability cases. He described misuse as a *defense* with the burden of proof on the defendant:

> The plaintiff has the burden of proving the product was sold in a defective condition, and that such defect was the proximate cause of the injury complained of. The defenses of assumption of risk, misuse, and change in the product not reasonably foreseeable to the manufacturer are available to the defendant who carries the burden of proof in such.[163]

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[160]Note, *Abnormal Use in the Strict Products Liability Case, supra* note 156, at 667.

[161]*Id.* at 666; *see also* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

[162]237 F. Supp. at 429.

[163]258 N.E.2d at 665.

The most exhaustive examination of misuse was done in *Perfection*, which relied in part on Judge Sharp's opinion in *Cornette*, that misuse is a defense with the burden of proof on the defendant. Judge Pfaff separated misuse into two categories. First, misuse of a product may be part of the defense of assumption of risk if the defective condition of the product is discovered by the plaintiff or brought to his attention by a legally sufficient warning.[164] However, mere knowledge of the defect apparently would not automatically establish that plaintiff had assumed the risk.[165] Second, the product could be misused if it is used in a manner or purpose not foreseeable by the manufacturer.[166] The first approach is the more palatable, since it is a subjective test of the plaintiff's actual knowledge, and has many of the characteristics of assumption of risk. The second, however, falls back to a test which sounds very much like the "no duty" rationale of negligence. As with all the other problem areas in strict liability, this issue needs to be clarified by the Indiana courts.

XI. CONCLUSION

It is difficult to assess in what direction Indiana courts are headed in adopting standards for strict liability in tort, since various courts have espoused contradictory viewpoints. The current lack of clear standards creates confusion for the bar and for the lower courts which must assess, present, and decide strict liability cases.

It appears that most Indiana judges believe that negligence law has a strong influence on strict liability concepts.[167] Whether this judicial penchant derives from a purposeful reasoning process, our legal education, or other factors is unanswerable. Whatever its source, this viewpoint makes it unlikely that Indiana courts will wholeheartedly embrace the *Cronin* approach of total rejection of negligence principles. The policy considerations underlying *Cronin* and its predecessors need not be forgotten however, and could be used in applying the Wade/Keaton approach, which is more readily adaptable to Indiana judicial concepts.

Under Wade/Keaton, the fact-finder simply imputes knowledge of the defect to the manufacturer, then asks if the manufacturer would be negligent in marketing the product with such knowledge. The seven-factor examination to be made by the judge under

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[164]258 N.E.2d at 689.

[165]In order to prove incurred or assumed risk the defendant must prove *actual knowledge, actual understanding, actual appreciation and voluntariness. See* RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965). Thus, showing that plaintiff knew of the defect does not automatically meet all elements of assumption of the risk.

[166]258 N.E.2d at 689.

[167]*See, e.g.*, discussion of foreseeability in Vargo, *1976 Survey*, *supra* note 5, at 276.

Wade/Keaton would also eliminate many of the problems created by Indiana's decisions. For example, the obvious danger rule would no longer automatically defeat a plaintiff's recovery as a matter of law; it would be one of at least six other factors to be weighed by the court in deciding whether the case should go to the jury.[168]

A standard is desperately needed for the guidance of bench and bar. Indiana could and should adopt a well-defined standard which maintains the integrity of the social policies underlying strict liability in tort and at the same time is true to Indiana common law traditions.

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[168]Dean Wade suggests the following seven factors are to be weighed by the court:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *Nature of Strict Tort Liability*, *supra* note 7, at 837-38.